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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 972.

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND STANFORD, AND OTHERS,

APPELLANTS,

vs.

ALBERT GALLATIN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 11, 1878.

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1 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit court of the United States, ninth circuit district of California. In equity.

The President of the United States of America, greeting:

To the Central Pacific Railroad Company, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, Jr., and Charles F. Crocker: You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the court room in San Francisco, on the first Monday of October, A. D. 1878, to answer a bill of complaint exhibited against you in said court by Albert Gallatin, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty of five thousand dollars.

Witness, the honorable Morrison R. Waite, Chief Justice of the supreme court of the United States, this [SEAL.] 4th day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103d.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk*

2 Memorandum pursuant to Rule 12, supreme court U. S.:

You are hereby required to enter your appearance in the above suit, on or before the first Monday of October next, at the clerk's office of said court, pursuant to said bill; otherwise, the said bill will be taken *pro confesso.*

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed.) U. S. Marshal's Office, district of California.

I hereby certify that I received the within subpœna on the 5th day of September, A. D. 1878, and personally served the same on the 5th day of September, A. D. 1878, by delivering to and leaving with E. H. Miller, Jr., Secretary of the "Central Pacific Railroad Company," Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, Jr., and Charles F. Crocker, said defendants, personally, a certified copy thereof, at the city and county of San Francisco, in said district.

A. W. POOLE, *U. S. Marshal.*
By GEO. W. FOSTER, *Deputy.*

Filed September 19, 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep'y Clk.*

3 *Bill in Equity.*

In the circuit court of the United States for the district of California. In equity.

To the judges of the circuit court of the United States for the district of California:

Albert Gallatin, of the city and county of Sacramento, and a citizen of the State of California, brings this his bill against the Central Pacific Railroad Company, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, jr., and Charles F. Crocker, each and all of the city and county of San Francisco, and citizens of the State of California, and Coltis P. Huntington, of the city and county of New York, and a citizen of the State of New York.

And thereupon your orator complains and says that on or about the 28th day of June, 1861, the Central Pacific Railroad Company of California was duly organized and incorporated as a railroad corporation under and pursuant to the laws of the State of California, in, under and by the name aforesaid, for the purpose of constructing and operating a certain line of railroad from the city of Sacramento to the eastern boundary of the State of California, and continued to be and exist as such corporation
4 until the same *same* became merged in and was succeeded by a certain other corporation under the name of the Central Pacific Company as hereinafter stated.

That by act of Congress of the United States, approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes, certain rights, grants and privileges were granted to and conferred upon said corporation, the Central Pacific Railroad Company of California, its associates, successors and assigns, under, upon and subject to certain conditions, terms, reservations, limitations, obligations and requirements, substantially as follows, to wit: Said corporation was thereby authorized to construct a railroad and telegraph line from the Pacific coast at or near San Francisco, or the navigable waters of Sacramento river, to the eastern boundary of California, and to meet and connect with the railroad and telegraph line of the Union Pacific Railroad Company, a corporation created in and by said act of Congress, on the eastern boundary of California; said corporation, the Central Pacific Railroad Company of California, was
5 thereby further authorized, after completing its road across said State, to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified upon the

route in said act indicated, until said road should meet and connect with the road of said Union Pacific Railroad Company, and the whole line of said railroad and branches and telegraph be completed.

The right of way through the public lands of the United States was further thereby granted to said Central Pacific Railroad Company of California for the construction of said railroad and telegraph line; and the right, power and authority was thereby given to said company to take from the public lands adjacent to the line of said road earth, stone, timber, and other materials for the construction thereof. Said right of way was granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it might pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine-shops, switches, side-tracks, turn-tables, and water-stations. That in and by the provisions of section
6 three (3) of said act there was further thereby granted to said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon, every alternate section of public land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof and within the limits of ten miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim might not have attached at the time the line of said road should be definitely fixed: *Provided*, That all mineral lands should be excepted from the operation of said act; but where the same should contain timber, the timber thereon was thereby granted to said company.

It was further thereby enacted that whenever said company should have completed forty consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by said act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appur-
7 tenances of a first-class railroad, the rails and all other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States should appoint three commissioners to examine the same and report to him in relation thereto; and if it should appear to him that forty consecutive miles of said railroad and telegraph line had been completed and equipped in all respects as required by said act, then, upon certificate of said commissioners to that effect, patents should issue, conveying the right and title to said lands to said Central Pacific Railroad Company of California, on each side of the road as far as the same was com-

pleted, to the amount aforesaid; and patents should in like manner issue as each forty miles of said railroad and telegraph line were completed upon certificate of said commissioners.

It was further thereby enacted in and by section five of said act that for the purposes therein mentioned the Secretary of the Treasury should, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph in accordance with the provisions of said act, issue to said last-named company bonds
8 of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest might be paid in United States treasury notes or any other money or currency which the United States had declared or should declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and that to secure the payment to the United States, as in said act provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon paid by the United States, the issue of said bonds and delivery thereof to the company, should *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures and property of every kind and description and in consideration of which said bonds might be issued, and that on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of said act, the said road, with all the rights, functions, immunities and appurtenances thereunto belonging, and also all lands granted to said company by the United States which, at the time of
9 said default should remain in the ownership of the said company, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.

It was further thereby enacted that the grants aforesaid were made upon condition that said company should pay said bonds at maturity, and should keep said railroad and telegraph line in repair and use, and should at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government should at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service,) and that all compensation for services rendered for the Government should be applied to the payment of said bonds and interest until the whole amount should be fully paid; that said company might also pay

the United States wholly or in part in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par, and that after said road should be completed until said bonds and interest should be paid at least five per centum of the net earnings of said road should also be annually applied to the payment thereof.

It was further thereby enacted that said company should file its acceptance of the conditions of said act in the Department of the Interior within six months after the passage of said act.

It was further thereby enacted that for three hundred miles of said road most mountainous and difficult of construction, to wit: one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof should be treble the number per mile hereinbefore provided, and the same should be issued and the lands therein granted be set apart upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same were completed, and between the sections last named of one hundred and fifty miles each the bonds to be issued to aid in the construction thereof should be double the number per mile first mentioned, and the same should be issued and the lands therein granted set apart upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same were completed: *Provided*, That no more than fifty thousand of said bonds should be issued under said act to aid in constructing the main line of said railroad and telegraph.

It was further thereby enacted that whenever the word "company" was used in said act, it should be construed to embrace the words the associates, successors, and assigns, the same as if the words had been properly added thereto.

It was thereby further enacted that in case said company should fail to comply with the terms and conditions of said act by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but should permit the same, for an unreasonable time, to remain unfinished or out of repair and unfit for use, Congress might pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and might direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company; provided, that if said roads should not be completed so as to form a continuous line of railroad, ready for use,

from the Missouri river to the navigable waters of the Sacramento river in California, by the first day of July, 1876, the whole of all said railroad to be constructed under the provisions of said act, together with all its furniture, fixtures, rolling stock, machine shops, lands, tenements, hereditaments and property of every kind and character should be forfeited to and taken possession of by the United States.

It was thereby further enacted that the better to accomplish the object of said act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress might at any time, having due regard for the rights of the said company, add to, alter, amend, or repeal said act.

That thereupon said Central Pacific Railroad Company of California assented to the terms and provisions of said act,
13 and filed its acceptance of the conditions thereof in the said Department of the Interior within six months after the passage of said act.

That thereafter by act of Congress of the United States, approved July 2, 1864, entitled "An act to amend an act entitled 'an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two," the foregoing provisions of said first-mentioned act were amended, modified, altered, changed, and added to by enactments substantially as follows, to wit:

It was thereby enacted that said company be, and thereby was, empowered to enter upon, purchase, take, and hold any lands or premises that might be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of its centre line, unless a greater width be required for the purpose of excavation or embankment, and also any lands or premises that might be necessary and proper for turnouts, standing places for cars, depots, station houses, or other structures required in the construction and operating of said road.

14 It was further thereby enacted that section three of said act (of 1862) be amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty;" and that the term "mineral land," wherever the same occurs in this said act and the act to which

this is an amendment, should not be construed to include coal and iron land.

It was thereby further enacted that only one-half of the compensation for services rendered for the Government by said company should be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said road.

It was thereby further enacted that section five of said act (of 1862) be so modified and amended that said company might, on the completion of each section of said road, issue its first mortgage bonds on its respective railroad and telegraph line, to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad company, respectively; and the lien of the United States bonds should be subordinate to that of the bonds of said company thereby authorized to be issued on its respective road, property, and equipments, except as to the provisions relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the Government of the United States, and that said section be further amended by striking out the word "forty," and inserting in lieu thereof the words, "on each and every section of not less than twenty."

And it was further thereby enacted that Congress might at any time alter, amend or repeal this last-mentioned act.

That said corporation assented to and accepted the said terms, conditions and provisions of said acts, and proceeded to construct and did construct and operate its said railroad and telegraph line under the provisions thereof and in the manner and within the time required thereby, to the eastern boundary of California, and eastwardly therefrom through the then Territory of Nevada to Promontory Point, in the Territory of Utah, about five hundred and fifty miles eastwardly from the boundary line of California, meeting and connecting at said point, in or about the month of May, 1869, with the railroad and telegraph line of said Union Pacific Railroad Company, and forming therewith a continuous through line from the Missouri river to the Pacific ocean, as required by said acts. That from time to time throughout the whole of said extent of said railroad and telegraph line said Central Pacific Railroad Company of California acquired, took possession of, used, held and enjoyed the right of way through the public lands granted to said company for the construction thereof, and earth, stone, timber and other materials from public lands adjacent thereto until the merger of said corporation with the Central Pacific Railroad Company, as hereinafter stated. That from time to time, as the requisite portions and sections of

its said railroad and telegraph line were completed, equipped, inspected and certified as required by said acts, patents were duly issued and delivered to said corporation, the Central Pacific Railroad Company of California, of and for the ten alternate sections of public land, designated by odd numbers, per mile, on each side of said railroad on the line thereof.

That from time to time during the progress of said work as the requisite portions and sections of its said railroad and telegraph line were duly completed, equipped, inspected and certified, as required by said acts, the Secretary of the Treasury of the
17 United States duly issued to said company bonds of the United States of the denomination, description, and character hereinbefore described, to the amount to which said company was at such times entitled under and by the terms and provisions of said acts, amounting in the aggregate, as your orator is informed and believes and alleges, at the par value thereof, to the amount of twenty-seven million eight hundred and fifty-five thousand six hundred eighty dollars ($27,855,680). That said company accepted and received the loan of said bonds as the same were issued, and used, converted, and applied the same and the proceeds thereof to the construction of its said railroad and telegraph line and payment therefor.

That said corporation also, as provided and allowed by the terms of said acts, from time to time, duly issued its first mortgage bonds on its respective railroad and telegraph line, to an amount equaling the amount of bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad company, amounting in the aggregate to the further sum of twenty-seven million eight hundred fifty-five thousand six
18 hundred eighty dollars, ($27,855,680.00,) and used and applied the same and the proceeds thereof to the construction of its said railroad and telegraph line, and payment therefor. That on or about the 21st day of June, 1870, the said Central Pacific Railroad Company of California merged, amalgamated, and consolidated its capital stock, debts, assets and franchises, with the Western Pacific Railroad Company, a railroad corporation then and there existing under and by virtue of the laws of the State of California, and formed a new corporation under the laws of the State of California, under, in and by the name of the Central Pacific Railroad Company, which said last-named corporation, then and thereby, became the successor of said first-named corporations, and then and thenceforth, until the same was merged in and succeeded by the corporation, the Central Pacific Railroad, as hereinafter more fully stated, existed as such corporation, and succeeded to, received, held, owned, and was entitled to all and singular the rights, privileges, franchises and property, of said

former corporation, the Central Pacific Railroad Company of California, subject to all and singular the duties, liabilities, conditions, reservations and limitations, imposed upon said last-named corporation, in and by the terms and provisions of said acts of Congress aforesaid.

That thereafter, and on or about the 20th day of August, 1870, said Central Pacific Railroad Company merged, amalgamated and consolidated its capital stock, debts, assets, and franchises with the California and Oregon Railroad Company and the San Joaquin Valley Railroad Company, and the San Francisco, Oakland and Alameda Railroad Company, three other and several railroad corporations then and there existing under and by the laws of the State of California, and formed a new corporation under the laws of the State of California, having a capital stock of the par value of $100,000,000.00, divided into one million of shares of the par value of $100.00 each, under, in and by the name of the Central Pacific Railroad, which said last-named corporation then and thereby became, ever since has been, and still is the successor of all said corporations, and thereupon succeeded to, received, held, owned and was entitled to, and still holds, owns, has and is entitled to all and singular the rights, privileges, grants, franchises, properties and immunities of each and all the aforesaid corporations, including said the Central Pacific Railroad Company and said the Central Pacific Railroad Company of California, subject to all and singular the duties, liabilities, debts, conditions, reservations and limitations imposed upon said corporation, the Central Pacific Railroad Company of California, in and by the terms and provisions of said acts of Congress aforesaid, including the said indebtedness to the United States upon the said subsidy bonds, amounting to the sum of $27,855,680.00, as hereinbefore stated, together with interest thereon.

That said corporation, the Central Pacific Railroad, ever since said 20th day of August, 1870, has held, operated, controlled, maintained, used and carried on, and still has, holds, operates, controls, maintains, uses and carries on said railroad and telegraph line from the Pacific Coast, at or near San Francisco, eastwardly through and across the States of California and Nevada, to Ogden in the Territory of Utah, about six hundred miles eastward from the eastern boundary of California, forming, with the railroad and telegraph line of the Union Pacific Railroad Company, a continuous through line from the Missouri River to the Pacific Ocean.

That said Central Pacific Railroad still has, holds and owns a large quantity of said land, granted and patented to said the Central Pacific Railroad Company of California in, under and

21 by virtue of the acts of Congress aforesaid, which said land is of great worth and value.

That on or about the month of May, 1878, the Congress of the United States passed a further and other act, approved May 7, 1878, entitled "An act to alter and amend the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes, approved July first, eighteen hundred and sixty-two,' and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act," the provisions of which said act, so far as they affect or apply to the said Central Pacific Railroad, are substantially as follows, to wit:

That the net earnings mentioned in said act of eighteen hundred and sixty-two of said railroad company shall be ascertained by deducting from the gross amount of its earnings, the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by it within the year in discharge of interest on its first mortgage bonds, whose lien has priority over the lien of the United
22 States, and excluding from consideration all sums owing or paid by said company for interest upon any other portion of its indebtedness, and that the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two, and that this section shall take effect on the thirtieth day of June, 1878, and be applicable to all computations of net earnings thereafter; but that it shall not affect any right of the United States or of said railroad company existing prior thereto. That the whole amount of compensation which may from time to time be due to said railroad company for services rendered for the Government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid to said corporation, and the other half thereof to be turned into the sinking fund thereinafter by said act provided for the uses therein mentioned. That there shall be established in the Treasury of the United States a sinking fund, which shall be invested by the Secretary of the
23 Treasury in bonds of the United States, and the semi-annual income thereof shall be in like manner from time to time invested, and the same shall accumulate and be disposed of as thereinafter mentioned; and in making such investments the Secretary shall prefer the five per centum bonds of the United States, unless for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable

to invest in other bonds of the United States; all the bonds belonging to said fund shall as fast as they shall be obtained be so stamped as to show that they belong to said fund, and that they are not good in the hands of other holders than the Secretary of the Treasury, until they shall have been endorsed by him and publically disposed of pursuant to said act.

That there shall be carried to the credit of the said fund on the first day of February in each year the one-half of the compensation for services thereinbefore named, rendered for the Government by said Central Pacific Railroad Company not applied in liquidation of interest; and in addition thereto the said company shall, on said day in each year, pay into the Treasury, to
24 the credit of said sinking fund, the sum of one million two hundred thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States, under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as in said act provided for the year ending on the thirty-first day of December next preceding.

That whenever it shall be made satisfactorily to appear to the Secretary of the Treasury by said company that seventy-five per centum of its net earnings, as thereinbefore defined, for any current year are or were insufficient to pay the interest for such year upon the obligations of said company, in respect of which obligations there may exist a lieu paramount to that of the United States, and that such interest has been paid out of such net earnings, said Secretary is thereby authorized, and it is made his duty to remit for such current year so much of the twenty-
25 five per centum of net earnings required to be paid into the sinking fund as aforesaid, as may have been thus applied and used in the payment of interest as aforesaid.

That no dividend shall be voted, made, or paid for or to any stockholder or stockholders in said company at any time when the said company shall be in default in respect of the payment of the said five per centum of the net earnings, or in respect of interest upon any debt, the lien of which or of the debt on which it may accrue, is paramount to that of the United States; and any officer or person who shall vote, declare, make, or pay, and any stockholder of said company who shall receive any such dividend contrary to the provisions of said act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding ten thousand dollars and by imprisonment not exceeding one year.

That the said sinking fund so established and accumulated, shall, at the maturity of said bonds so issued by the United States, be applied to the payment and satisfaction thereof, and of all interest paid by the United States thereon and
26 not reimbursed, subject to the provisions that said sinking fund so established and accumulated, shall be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such company lawfully paramount to the rights of the United States, and for the claims of other creditors, if any lawfully chargeable upon the funds so required to be paid into said sinking fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity: to the end that all persons having any claim upon said sinking fund may be entitled thereto in due order; but that these provisions shall not operate or be held to impair any existing legal right, except in the manner in said act provided, of any mortgage, lien, or other creditor of said company, nor to excuse said company from the duty of discharging out of other funds its debts to any creditor except the United States.

That all sums due to the United States from said company, whether payable presently or not, and all sums required to be paid to the United States, or into the Treasury, or into said sinking fund, under said act, or under the acts in said act referred to or otherwise, are thereby declared to be a lien
27 upon all the property, estate, rights, and franchises of every description granted or conveyed by the United States to said company, and also upon all the estate and property, real, personal, and mixed, assets and income of said railroad company, from whatever source derived, subject to any lawfully prior and paramount mortgage, lien, or claim thereon. But that said act shall not be construed to prevent said company from using and disposing of any of its property or assets in the ordinary, proper, and lawful course of its current business, in good faith and for valuable consideration.

That if said railroad company shall fail to perform all and singular the requirements of said act, and of the acts therein mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants and franchises derived or obtained by it from the United States, and it shall be the duty of the Attorney General to cause such forfeiture to be judicially enforced.

That nothing in said act shall be construed or taken in any wise to affect or impair the right of Congress, at any time
28 thereafter, further to alter, amend or repeal the said acts therein mentioned; and said act shall be subject to altera-

tion, amendment or repeal as, in the opinion of Congress, justice or the public welfare may require, and that nothing in said act contained shall be held to deny, exclude, or impair any right or remedy in the premises existing in favor of the United States at the time of the passage of said act.

That each and every of the provisions in said act contained shall severally and respectively be deemed, taken and held as in alteration and amendment of said act of eighteen hundred and sixty-two, and of said act of eighteen hundred and sixty-four, respectively, and of both of said acts.

Your orator further shows that he is, and long has been, a *bona fide* stockholder of said corporation, the Central Pacific Railroad, holding and owning shares of stock therein in his own name and right, and that he brings this his bill of complaint as well in his own behalf, as in behalf of all other stockholders of said corporation who shall elect to join in the prosecution of this suit, and contribute to the expenses thereof.

That the said defendants, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, G. H. Miller, Jr., Charles
29 F. Crocker, and Collis P. Huntington, are the directors of said corporation, and are and constitute the board of directors and managers thereof.

That said defendants give out, allege, pretend, and declare that said last-mentioned act of Congress, approved May 7th, 1878, is not in any just sense amendatory of the said acts of 1862 and 1864, or either of them, and that the same is in direct violation of the contract existing between the government of the United States and said corporation under, in and by the said acts of 1862 and 1864, and each of them, and that it impairs the obligation of said contract, and that said act approved May 7, 1878, is unconstitutional and void and not binding upon said defendants or any of them; and further pretend, give out and alle*d*ge that said last-mentioned act impairs the obligation of the contract existing between said corporation and the government of the United States in this, that it requires said company to pay to the United States large sums of money many years in advance of the time at which the same would become due under said contract, and that in other and various respects said act is in violation of the Constitution of the United States, and that the same is wholly
30 void. That said defendants, acting under the color and pretense aforesaid, further threaten, assert and declare that they will not, nor will any or either of them, nor will said corporation, in any way or at all, conform to, obey, or be governed by, or carry out, or accept, or recognize, or perform, or comply with said act or any of the terms or requirements thereof, and especially that said company will not pay into the Treasury to the credit of said sinking fund created by said act any of the moneys thereby

That the said sinking fund so established and accumulated, shall, at the maturity of said bonds so issued by the United States, be applied to the payment and satisfaction thereof, and of all interest paid by the United States thereon and
26 not reimbursed, subject to the provisions that said sinking fund so established and accumulated, shall be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such company lawfully paramount to the rights of the United States, and for the claims of other creditors, if any lawfully chargeable upon the funds so required to be paid into said sinking fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity: to the end that all persons having any claim upon said sinking fund may be entitled thereto in due order; but that these provisions shall not operate or be held to impair any existing legal right, except in the manner in said act provided, of any mortgage, lien, or other creditor of said company, nor to excuse said company from the duty of discharging out of other funds its debts to any creditor except the United States.

That all sums due to the United States from said company, whether payable presently or not, and all sums required to be paid to the United States, or into the Treasury, or into said sinking fund, under said act, or under the acts in said act referred to or otherwise, are thereby declared to be a lien
27 upon all the property, estate, rights, and franchises of every description granted or conveyed by the United States to said company, and also upon all the estate and property, real, personal, and mixed, assets and income of said railroad company, from whatever source derived, subject to any lawfully prior and paramount mortgage, lien, or claim thereon. But that said act shall not be construed to prevent said company from using and disposing of any of its property or assets in the ordinary, proper, and lawful course of its current business, in good faith and for valuable consideration.

That if said railroad company shall fail to perform all and singular the requirements of said act, and of the acts therein mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants and franchises derived or obtained by it from the United States, and it shall be the duty of the Attorney General to cause such forfeiture to be judicially enforced.

That nothing in said act shall be construed or taken in any wise to affect or impair the right of Congress, at any time
28 thereafter, further to alter, amend or repeal the said acts therein mentioned; and said act shall be subject to altera-

tion, amendment or repeal as, in the opinion of Congress, justice or the public welfare may require, and that nothing in said act contained shall be held to deny, exclude, or impair any right or remedy in the premises existing in favor of the United States at the time of the passage of said act.

That each and every of the provisions in said act contained shall severally and respectively be deemed, taken and held as in alteration and amendment of said act of eighteen hundred and sixty-two, and of said act of eighteen hundred and sixty-four, respectively, and of both of said acts.

Your orator further shows that he is, and long has been, a *bona fide* stockholder of said corporation, the Central Pacific Railroad, holding and owning shares of stock therein in his own name and right, and that he brings this his bill of complaint as well in his own behalf, as in behalf of all other stockholders of said corporation who shall elect to join in the prosecution of this suit, and contribute to the expenses thereof.

That the said defendants, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, G. H. Miller, Jr., Charles
29 F. Crocker, and Collis P. Huntington, are the directors of said corporation, and are and constitute the board of directors and managers thereof.

That said defendants give out, allege, pretend, and declare that said last-mentioned act of Congress, approved May 7th, 1878, is not in any just sense amendatory of the said acts of 1862 and 1864, or either of them, and that the same is in direct violation of the contract existing between the government of the United States and said corporation under, in and by the said acts of 1862 and 1864, and each of them, and that it impairs the obligation of said contract, and that said act approved May 7, 1878, is unconstitutional and void and not binding upon said defendants or any of them; and further pretend, give out and alledge that said last-mentioned act impairs the obligation of the contract existing between said corporation and the government of the United States in this, that it requires said company to pay to the United States large sums of money many years in advance of the time at which the same would become due under said contract, and that in other and various respects said act is in violation of the Constitution of the United States, and that the same is wholly
30 void. That said defendants, acting under the color and pretense aforesaid, further threaten, assert and declare that they will not, nor will any or either of them, nor will said corporation, in any way or at all, conform to, obey, or be governed by, or carry out, or accept, or recognize, or perform, or comply with said act or any of the terms or requirements thereof, and especially that said company will not pay into the Treasury to the credit of said sinking fund created by said act any of the moneys thereby

required to be paid by said company thereto, but that they and each of them and said corporation shall and will at all times oppose, contest, withstand, disregard and refuse to perform or comply with each, every and all of the requirements, terms and provisions of said act.

Your orator further shows that said defendants, directors of said corporation, have, since the passage of said act of Congress, duly held a meeting of the board of directors of said corporation and have thereat, acting as and in their capacity of said board, duly resolved on behalf of said corporation and the directors, officers and mangement thereof, that said company should not and would not comply with the provisions of said act of
31 Congress in any respect, and that said company should not and would not at any time pay into the Treasury of the United States to the credit of the sinking fund created by said act the sum, amount or money required by the provisions of said act or any part thereof; and that said company, and the officers and directors thereof, should and would resist and contest any and all proceedings under said act or otherwise to coerce said company into a compliance therewith, or to enforce the penalties or forfeitures provided in and by the terms and provisions of said act.

Your orator further shows that said company, at the time of the voting and making of the dividend hereinafter mentioned, was in default in respect of the payment of the said five per centum of the net earnings as required by said act, and had failed, neglected, and refused to pay the same, that said defendants, directors of said corporation, being so in default, have, since the passage of said act, approved May 7, 1878, to wit: on the 28th day of August, 1878, and with knowledge of the facts aforesaid, and in defiance of the terms and requirements of said last-mentioned act, duly held a meeting of the board of directors of
32 said corporation, and have thereat, acting for and on behalf of and in the name of said corporation, voted, made, declared, and directed the payment of a dividend to and for the stockholders of said company, out of the earnings of said company, made and accumulated since the 30th day of June, 1878, of one per centum of and upon the capital stock of said corporation.

That the present indebtedness of said corporation, as nearly as your orator can estimate and state the same aside from interest to accrue, is as follows, to wit:

Upon its said first mortgage bonds	$27,855,680 00
Upon said United States bonds	27,855,680 00
Upon other bonds and obligations, about	40,288,640 00
Amounting in the aggregate to about	96,000,000 00

That said company has not money or funds sufficient in amount

to pay said dividend voted and declared and directed to be paid as aforesaid and provide for the maintenance and current expenses of its said railroad and telegraph line, and enable it to reserve and accumulate a sufficient amount on and before the first day of February, 1879, or within six months next thereafter, to meet the requirements of said act of Congress approved May 7, 1878, and that the payment of such dividend would ex-
33 haust all the money in the treasury of said company, and render said company utterly unable to comply with the provisions and requirements of said act, all of which the said directors of said corporation well knew and well know.

Your orator further shows that the matter in dispute in this suit exceeds, exclusive of costs, the sum and value of five hundred dollars, and arises under the laws of the United States herein before mentioned. That unless restrained by the order and decree of this Court the said defendants will pay the said dividend so voted and declared, and will put it out of and beyond the power of said corporation to comply with the provisions and requirements of said last mentioned act, or to pay into the treasury of the United States to the credit of said sinking fund the money and amount required by said act to be paid by said company thereto; and will further utterly disregard and will not perform or comply with any of the requirements or provisions of said act, at any time or at all, and will willfully and intentionally cause said company to fail to perform all and singular, each and every the requirements of said act to be by it performed for the
34 period of six months and upwards next after such performance shall and will be due from said company, which failure to perform on the part of said company and said defendants, it is declared in and by the terms and provisions of said act, shall and will operate as a forfeiture of all the rights, privileges, grants, and franchises derived or obtained by said company from the United States; that such forfeiture thereof would forfeit to the United States the said lands granted and patented to said corporation as hereinbefore stated, also the right of way through and over the public lands, and would immediately render said corporation wholly insolvent, to the great and irreparable injury of your orator and all other *bona fide* stockholders of said corporation.

All which actings, doings, and pretenses of said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator and all other stockholders of said corporation.

In consideration whereof and forasmuch as your orator is remediless in the premises, as or by the strict rules of the
35 common law, and is only relievable in a court of equity, where matters of this nature are properly cognizable and

relievable; and that the said the Central Pacific Railroad, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, Jr., Charles F. Crocker, and Collis P. Huntington, their attorneys, agents, officers, and servants, by the decree of this Honorable Court, may be perpetually restrained and enjoined from paying said dividend, voted and declared as aforesaid, or any part thereof, or any dividend whatever, and from doing any other or further act or thing that will or will tend to jeopardize or imperil or cause or tend to cause a forfeiture under said act of any of the rights, privileges, grants, or franchises, derived or obtained by said corporation from the United States, and that they and each of them may be perpetually enjoined and commanded to perform, obey, carry out, conform to, and comply with each, every, and all the requirements and provisions of said act of Congress, approved May 7, 1878.

And that your orator may have such other or further relief as to this Honorable Court may seem meet or as equity may require.

May it please the honorable court to grant unto your
36 orator the writ of injunction issuing out of and under the seal of this court, directed to the said the Central Pacific Railroad, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, Jr., Charles F. Crocker, and Collis P. Huntington, their attorneys, officers, agents, and servants, commanding them, and each of them, absolutely to resist and refrain from paying said dividend voted and declared as aforesaid, or any part thereof, or any dividend whatever, and from doing any other or further act or thing that will or will tend to jeopardize or imperil or cause or tend to cause a forfeiture under said act of any of the rights, privileges, grants, or franchises derived or obtained by said corporation from the United States, until the further order of this honorable court in the premises.

May it please this honorable court to grant to your orator the writ of *subpœna* issuing out of and under the seal of this court, directed to the said the Central Pacific Railroad, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, Jr., Charles F. Crocker, and Collis P. Huntington, commanding them, and each of them, under a certain penalty to be
37 therein inserted, to be and appear in this court at some certain day to be therein named, and then and there to answer the premises; and further to stand to, abide by, and perform such order and decree as shall be passed and decreed therein agreeably to equity and good conscience.

And your orator will ever pray, etc.

ALBERT GALLATIN.

HOSMER P. MCKOON, *Solicitor.*
J. P. HOGE, *of Counsel.*

38 UNITED STATES OF AMERICA,
District of California, ss:

Albert Gallatin being duly sworn says that he is the orator and complainant in the foregoing bill; that he has heard the same read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

ALBERT GALLATIN.

Subscribed and sworn to this 4th day of September, 1878, before me.

JOS. F. O'BEIRNE,
Commr. of U. S. Circuit Court, Cala.

(Endorsed.) Filed Sept. 4th, 1878.
L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dpy. Clk.*

39 *Demurrer.*

In the circuit court of the United States of the ninth circuit, district of California.

ALBERT GALLATIN, Complainant,
vs.
CENTRAL PACIFIC RAILROAD COMPANY *et al.*, Defendants. } In equity.

The demurrer of the Central Pacific Railroad Company, Leland Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, Jr., and Charles F. Crocker, defendants, to the bill of complaint of Albert Gallatin, complainant.

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth demur in law to the said bill, and for cause of demurrer showeth that the said complainant hath not by his said bill made such a case as entitles him in a court of equity to any discovery or relief from or against
40 these defendants or either of them touching the matters contained in said bill or any of such matters. Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do severally demur to the said bill, and to all the matters and things therein contained, and pray the judgment of this honorable court, whether they shall be compelled to make any further or other answer to the said bill, and

pray to be hence dismissed, with their reasonable costs in this behalf sustained.

WILSON & WILSON,
Solicitors for Defendants.
McALLISTERS & BERGIN,
Sols. for Defts.
HALL McALLISTER,
Of Counsel.
S. M. WILSON,
Counsel for Defendants.

We, the counsel for the defendants in the above-entitled suit, do hereby certify that in our opinions, respectively, the foregoing and annexed demurrer is well founded in point of law.

S. M. WILSON,
Counsel for Defendants.
HALL McALLISTER,
Of Counsel for Defts.

41 *Demurrer to Complaint.*

In the circuit court of the United States of the ninth circuit, district of California.

ALBERT GALLATIN, Complainant,
vs.
CENTRAL PACIFIC RAILROAD COMPANY *et al.*, Defendants. } In equity.

STATE OF CALIFORNIA,
City and County of San Francisco, ss.:

David D. Colton, being duly sworn on behalf of the other defendants as well as on his own behalf, deposes and says that he is acquainted with the matters involved in this suit, and set forth in the complaint herein, and that the demurrer interposed on behalf of the defendants, and hereunto annexed, was not and is not interposed for delay.

DAVID D. COLTON.

Sworn to and subscribed before me, this 10th day of September, A. D. 1878.

[SEAL.] JAMES MASON,
Notary Public.

(Endorsed.) Filed September 11th, 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dpy. Clk.*

42 Service of a copy of the within is hereby admitted, this 11th day of September, 1878.

H. P. McKOON,
Solicitor for Complainant.

43 *Certificate of enrollment.*

At a stated term of the circuit court of the United States of America, for the district of California, held at the court room, in the city of San Francisco, on Monday, the 14th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the Honorable Lorenzo Sawyer, circuit judge.

ALBERT GALLATIN
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY & *al.* } No. 1965.

The complainant herein filed his bill of complaint herein against the defendants therein-named, on the 4th day of September, A. D. 1878. Thereupon a subpœna to appear and answer said bill of complaint was issued, returnable on the first Monday of October, A. D. 1878, and service of said writ made upon each of said defendants personally prior to the return day thereof, all of which will appear by the said writ and the marshal's return thereon endorsed. Said writ of subpœna is hereto annexed.

The defendants appeared herein, by Messrs. Wilson & Wilson and McAllisters and Bergin, as their solicitors.

On the 11th day of September, A. D. 1878, defendants
44 filed a demurrer to said bill of complaint, and thereafter, to wit: on the 14th day of October, A. D. 1878, said cause having come on to be heard upon said bill of complaint and demurrer, an order was made and entered herein, in the words and figures following to wit:

45 *Order on Demurrer.*

At a stated term of the circuit court of the United States of America, for the district of California, held at the court room, in the city of San Francisco, on Monday, the 14th day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the Honorable Lorenzo Sawyer, circuit judge.

ALBERT GALLATIN
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY *et al.* } No. 1965.

This cause, coming on this day for argument upon a demurrer to the bill of complaint herein, F. J. Bergin, Esq., appearing on behalf of demurrants, and H. P. McKoon, Esq., in support of said bill, was submitted to the court for consideration and decision, and the court thereupon after due deliberation ordered that said demurrer be overruled, and the defendants declining to answer said bill of complaint, it is ordered that a decree be entered herein in pursuance of the prayer of said bill of complaint.

I hereby certify that the foregoing is a full, true and correct copy of an original order made and entered in the above entitled action.

46 Attest my hand and seal of said circuit court, this 14th day of October, A. D. 1878.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

And, thereupon a final decree was duly filed and entered herein, which decree is in the words and figures following, to wit:

47 *Decree.*

At a stated term of the circuit court of the United States in and for the district of California, held at the court room of said court in the city and county of San Francisco on the 14th day of October, A. D. 1878.

Present: Hon. Lorenzo Sawyer, circuit judge.

ALBERT GALLATIN
vs.
THE CENTRAL PACIFIC RAILROAD, LELAND Stanford, Charles Crocker, David D. Colton, E. W. Hopkins, E. H. Miller, Jr., Charles F. Crocker, and Collis P. Huntington. } No. 1965. In equity.

This action having been brought to trial upon the issue of law arising upon the bill of complaint and the demurrer thereto; and it appearing to the Court that the complainant is entitled to judgment upon the said demurrer; it is adjudged and decreed:

That the defendants and each of them, their attorneys, agents, officers, and servants, be perpetually restrained and en-
48 joined from paying the dividend of one per centum of and upon the capital stock of said the Central Pacific Railroad, which was on the 28th day of August, 1878, voted, made, declared, and directed to be paid to the stockholders of said corporation, The Central Pacific Railroad, or from paying any part thereof, and from making, voting, declaring, or paying any other or any dividend whatever upon the capital stock of said corporation contrary to or while said defendants or said corporation are in default in respect to any of the terms, requirements or provisions of that certain act of Congress of the United States, approved May 7, 1878, entitled "An act to alter and amend the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred

and sixty-two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act," and from doing any other or further thing whatever in the premises in contravention or disregard of said act of Congress, or that will jeopardize or imperil,
49 or cause or tend to cause a forfeiture under said act of any of the rights, privileges, grants or franchises derived or obtained by said corporation from the United States.

And that said defendants, and each of them, their attorneys, agents, officers, and servants do perform, obey, carry out, conform to, and comply with each, every, and all the requirements, conditions, and provisions of said act of Congress.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered 14th October, A. D. 1878.
L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *D'p'y Cl'k.*

Whereupon said pleadings, subpœna, certified copy of order, and final decree are hereto annexed, said final decree being duly signed, filed and enrolled pursuant to the practice of said circuit court.

Attest, &c.:
[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

50 (Endorsed:) Enrolled Papers.
Filed October 14, 1878.
L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

51 *Order Granting an Appeal to U. S. S. C.*

At a stated term of the circuit court of the United States of America for the district of California, held at the court room in the city and county of San Francisco, on Tuesday, the 22d day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: the Honorable Lorenzo Sawyer, circuit judge.

ALBERT GALLATIN
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

Now, at this day, on motion of T. J. Bergin, Esq., of counsel for defendants, H. P. McKoon, Esq., of counsel for complainant, being present in open court, and not opposing said motion, it is ordered that an appeal from the decision rendered, and the decree

ordered and filed and entered in the above entitled cause on the 14th day of October, A. D. 1878, of the July term A. D. 1878, of said circuit court to the Supreme Court of the United States of America be, and the same is hereby, allowed, and that a certified transcript of the pleadings and proceedings be forthwith transmitted to the Supreme Court of the United States of America, upon the appellant giving a bond in the sum of five hundred dollars.

52 *Bond on Appeal.*

In the Supreme Court of the United States of America—

THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant,
vs.
ALBERT GALLATIN, Appellee.

Know all men by these presents, that we, Robert Robinson and Benjamin B. Redding, of district and State of California, are held and firmly bound unto Albert Gallatin in the sum of five hundred ($500) dollars lawful money of the United States of America, to be paid to the said Albert Gallatin, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, administrators firmly by these presents. Sealed with our seals. Dated this 22d day of October, A. D. 1878. Whereas the above named Central Pacific Railroad Company and Leland Stanford, Charles Crocker, D. D. Colton, E. W. Hopkins, E. H. Miller, Jr., and Charles F. Crocker have taken an appeal to the Supreme Court of the United States of America to reverse the decree rendered by the circuit court
53 of the United States of the ninth judicial circuit in and for the district of California, in the suit entitled Albert Gallatin *vs.* Central Pacific Railroad Company, Leland Stanford, Charles Crocker, D. D. Colton, E. W. Hopkins, E. H. Miller, Jr., and Charles F. Crocker.

Now, therefore, the condition of this obligation is such that if the above-named Central Pacific Railroad Company, Leland Stanford, Charles Crocker, D. D. Colton, E. W. Hopkins, E. H. Miller, Jr., and Charles F. Crocker shall prosecute their said appeal to effect, and answer all costs; if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

(Signed) ROBERT ROBINSON, [SEAL.]
(Signed) BENJAMIN B. REDDING, [SEAL.]

UNITED STATES OF AMERICA,
District of California, city and county of San Francisco, ss:

Robert Robinson and Benjamin B. Redding, being first duly

sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of five hundred dollars lawful money of the United States of America exclusive of property exempt from execution and over and above all debts and liabilities.

(Sgd) ROBERT ROBINSON.
" BENJAMIN B. REDDING.

Subscribed and sworn to before me this 22d day of October, A. D. 1878.

(Sgd) CHARLES J. TORBERT,
United States Commissioner District of California.

54 Endorsed: The form of the within bond, and the sufficiency of the sureties thereon are hereby approved.

Dated Oct. 22, 1878.

(Signed) LORENZO SAWYER,
U. S. Circuit Judge 9th Judicial Circuit.

Filed October 21, 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dpy. Clk.*

55 UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing fifty-four written pages, numbered from 1 to 54, both inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States of America therein.

Witness my hand and seal of said circuit court this 22nd day of October, A. D. 1878.

[SEAL] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

Endorsed on the cover: CALIFORNIA, *C. C. U. S.* No. 972. The Central Pacific Railroad Company, Leland Stanford, *et al.*, appellants, *vs.* Albert Gallatin. Filed 11th November, 1878.

In the Supreme Court of the United States.

No. 972.

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND STANFORD AND OTHERS, APPELLANTS,

Vs.

ALBERT GALLATIN, APPELLEE.

BRIEF OF S. W. SANDERSON FOR APPELLANTS.

Judd & Detweiler, Printers.

In the Supreme Court of the United States.

No. 972.

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND STANFORD AND OTHERS, APPELLANTS.

Vs.

ALBERT GALLATIN, APPELLEE.

BRIEF OF S. W. SANDERSON FOR APPELLANTS.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 972.

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND STANFORD AND OTHERS, APPELLANTS,

vs.

ALBERT GALLATIN, APPELLEE.

BRIEF OF S. W. SANDERSON FOR APPELLANTS.

CASE.

This is a suit in equity against the Central Pacific Railroad Company and its board of directors, by one of its stockholders. As appears upon the face of the bill, the Central Pacific Railroad Company is successor to the Central Pacific Railroad Company of California, named in the Pacific Railroad acts of Congress, of July 1, 1862, and July 2, 1864, (12 Stats., 492, and 13 Stats., 358,) and of four other railroad corporations organized under the laws of California. (Record, pp. 3, 8, 9.) The construction of several sections of the Pacific Railroad acts is involved in the case. These sections, for the sake of convenience, are printed in full at the close of this statement. Congress, on the 7th of May, 1878, passed an act to amend the Pacific Railroad acts, which will also be found printed in full next after said sections of the Pacific Railroad acts. This suit was brought to compel appellants to comply with the requirements of

this last-named act, and the bill alleges that the board of directors have declared a dividend, contrary to the provisions of said act, and give out and threaten, that they will not comply in any respect with the requirements of said act; that one of the consequences of their conduct, if persisted in, will be a forfeiture of all the property and franchises of said corporation to the United States, to the irreparable injury of the complainant. The prayer is for an injunction, restraining the directors from paying said dividend, and commanding them to comply, in all respects, with the requirements of said act. The appellants demurred to the bill upon the ground that said act was unconstitutional, and, therefore, imposed upon them no legal obligation. The demurrer was overruled, and, appellants declining to answer, final decree was entered against them, as prayed for in the bill.

SECTIONS OF PACIFIC RAILROAD ACTS ABOVE REFERRED TO.

First.—Sections of the act of July 1, 1862.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said company [Union Pacific] for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops and depots, machine shops, switches, side tracks, turntables, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.

SEC. 3, (as amended by section 4 of act of July 2, 1864.) *And be it further enacted*, That there be, and is hereby, granted to the said company [Union Pacific] for the purpose of aid-

ing in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *ten* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of *twenty* miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 4. (As amended by section 6, act of 1864.) *And be it further enacted*, That whenever said company shall have completed *twenty* consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all the necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all other iron used in the construction and equipment of of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report in relation thereto; and if it shall appear to him that *twenty* consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each *twenty* miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation or otherwise shall be filled by

the President of the United States: *Provided, however*, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such *twenty* miles have been completed, in the manner required by this act, and setting forth with certainty the points where such *twenty* miles begin and where the same end; which oath shall be taken before a judge of a court of record.

SEC 5. *And be it further enacted*, That, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of *forty* [afterwards, by act of 1864, reduced to *twenty*] consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of *sixteen* of said bonds per mile for each section of forty [twenty] miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of the said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed.

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company [Union Pacific] shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government, whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and *all* [by act of 1864 reduced to half] *compensation* for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 9. *And be it further enacted*, That * * * the Central Pacific Railroad Company of California, *a corporation existing under the laws of the State of California*, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, *upon the same terms and conditions, in all respects*, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. *Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.*

SEC. 10. *And be it further enacted*, That * * * the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified in this act, upon the

routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky mountains and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued in the construction thereof shall be *treble* the number per mile hereinbefore provided; and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each the bonds to be issued to aid in the construction thereof shall be *double* the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacra-

mento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling-stock, machine-shops, lands, tenements and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States. * * *

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures—including repairs and the furnishing, running and managing of said road—shall exceed ten per centum upon its cost, (exclusive of the five per centum to be paid to the United States,) Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. *And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time—having due regard for the rights of said companies named herein*—ADD TO, ALTER, AMEND, OR REPEAL THIS ACT.

12 Stat., 492.

SECTIONS OF THE ACT OF 1864.

SEC. 5. *And be it further enacted*, That * * * , and that *only one-half* of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads.

SEC. 10. *And be it further enacted*, That section five of said act [act of July 1, 1862,] be so modified and amended, that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective railroad and

routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed.

SEC. 11. *And be it further enacted*, That for three hundred miles of said road most mountainous and difficult of construction, to wit, one hundred and fifty miles westwardly from the eastern base of the Rocky mountains and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, said points to be fixed by the President of the United States, the bonds to be issued in the construction thereof shall be *treble* the number per mile hereinbefore provided; and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each the bonds to be issued to aid in the construction thereof shall be *double* the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the commissioners as aforesaid that twenty consecutive miles of the same are completed: *Provided*, That no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: *Provided*, That if said roads are not completed so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacra-

mento river, in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling-stock, machine-shops, lands, tenements and hereditaments, and property of every kind and character, shall be forfeited to and be taken possession of by the United States. * * *

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures—including repairs and the furnishing, running and managing of said road—shall exceed ten per centum upon its cost, (exclusive of the five per centum to be paid to the United States,) Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. *And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time—having due regard for the rights of said companies named herein*—ADD TO, ALTER, AMEND, OR REPEAL THIS ACT.

12 Stat., 492.

SECTIONS OF THE ACT OF 1864.

SEC. 5. *And be it further enacted*, That * * * , and that *only one-half* of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads.

SEC. 10. *And be it further enacted*, That section five of said act [act of July 1, 1862,] be so modified and amended, that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective railroad and

telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies and public stores for the Government of the United States. * * *

SEC. 22. *And be it further enacted*, That *Congress may at any time alter, amend, or repeal* THIS ACT.

13 Stats., 358.

Act of May 7, 1868.

AN ACT to alter and amend the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act.

Whereas, on the first day of July, anno Domini eighteen hundred and sixty-two, Congress passed an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes;" and

Whereas afterwards, on the second day of July, anno Domini eighteen hundred and sixty-four, Congress passed an act in amendment of said first-mentioned act; and

Whereas the Union Pacific Railroad Company, named in said acts, and under the authority thereof, undertook to construct a railway, after the passage thereof, over some part of the line mentioned in said acts; and

Whereas, under the authority of the said two acts, the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, undertook to construct a railway, after the passage of said

acts, over some part of the line mentioned in said acts: and

Whereas the United States, upon demand of said Central Pacific Railroad Company, have heretofore issued, by way of loan and as provided in said acts, to and for the benefit of said company, in aid of the purposes named in said acts, the bonds of the United States, payable in thirty years from the date thereof, with interest at six per centum per annum, payable half yearly, to the amount of twenty-five million eight hundred and eighty-five thousand one hundred and twenty dollars, which said bonds have been sold in the market or otherwise disposed of by said company; and

Whereas the said Central Pacific Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas, after the passage of said acts, the Western Pacific Railroad Company, a corporation then existing under the laws of California, did, under the authority of Congress, become the assignee of the rights, duties and obligations of the said Central Pacific Railroad Company, as provided in the act of Congress passed on the third of March, anno Domini eighteen hundred and sixty-five, and did, under the authority of the said act and of the acts aforesaid, construct a railroad from the city of San Jose to the city of Sacramento, in California, and did demand and receive from the United States the sum of one million nine hundred and seventy thousand five hundred and sixty dollars of the bonds of the United States, of the description before mentioned as issued to the Central Pacific Company, and in the same manner and under the provisions of said acts; and upon and in respect of the bonds so issued to both said companies, the United States have paid interest to the sum of more than thirteen and a half million dollars, which has not been reimbursed; and

Whereas said Western Pacific Railroad Company has issued and disposed of an amount of its own bonds equal to the amount so issued by the United States to it, and secured the same by mortgage, which are, if lawfully issued

and disposed of, a prior and paramount lien to that of the United States, as stated, and secured thereby; and

Whereas said Western Pacific Railroad Company has since become merged in, and consolidated with, said Central Pacific Railroad Company, under the name of the Central Pacific Railroad Company, whereby the said Central Pacific Railroad Company has become liable to all the burdens, duties, and obligations before resting upon said Western Pacific Railroad Company; *and divers other railroad companies have been merged in and consolidated with said Central Pacific Railroad Company;* and

Whereas the United States, upon the demand of the said Union Pacific Railroad Company, have heretofore issued by way of loan to it and as provided in said acts, the bonds of the United States, *payable in thirty years from the date thereof*, with interest at six per centum per annum, payable half-yearly, the principal sums of which amount to twenty-seven million two hundred and thirty-six thousand five hundred and twelve dollars; on which the United States have paid over ten million dollars interest over and above all reimbursments; which said bonds have been sold in the market or otherwise disposed of by said corporation; and

Whereas said corporation has issued and disposed of an amount of its own bonds equal to the amounts so issued to it by the United States as aforesaid, and secured the same by mortgage, and which are, if lawfully issued and disposed of, a prior and paramount lien, in the respect mentioned in said acts, to that of the United States, as stated, and secured thereby; and

Whereas the *total liabilities* (exclusive of interest to accrue) to all creditors, including the United States, of the said Central Pacific Company, amount in the aggregate to more than ninety-six million dollars, and those of the said Union Pacific Railroad Company to more than eighty-eight million dollars; and

Whereas the United States, in view of the indebtedness and operations of said several railroad companies respectively, and of the disposition of their respective incomes, *are not and cannot, without further legislation, be secure in their interests in and concerning said respective railroads and corporations*, either as mentioned in said acts or otherwise; and

Whereas *a due regard to the rights of said several companies respectively*, as mentioned in said act of eighteen hundred

and sixty-two, *as well as just security to the United States in the premises*, and in respect of all the matters set forth in said act, require that the said act of eighteen hundred and sixty-two be altered and amended as hereinafter enacted; and

Whereas, *by reason of the premises also*, as well as for *other causes of public good and justice*, the powers provided and reserved in said act of eighteen hundred and sixty-four for the amendment and alteration thereof ought also to be exercised as hereinafter enacted: Therefore,

☞ *Be it enacted by the Senate and Hous of Representatives of the United States of America in Congress assembled*, That the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two. This section shall take effect on the thirtieth day of June next, and be applicable to all computations of net earnings thereafter; but it shall not affect any right of the United States or of either of said railroad companies existing prior thereto.

SEC. 2. That the *whole* amount of compensation which may, from time to time, be due to said several railroad companies, respectively, for services rendered for the Government, *shall be retained by the United States*, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the *other half* thereof to be turned into the *sinking-fund* hereinafter provided, for the uses therein mentioned.

☞ SEC. 3. That there shall be established in the Treasury of the United States a sinking-fund, which shall be

invested by the Secretary of the Treasury in bonds of the United States; and the semi-annual income thereof shall be in like manner from time to time invested, and the same shall accumulate and be disposed of as hereinafter mentioned. And in making such investments the Secretary shall prefer the five per centum bonds of the United States, unless, for good reasons appearing to him, and which he shall report to Congress, he shall at any time deem it advisable to invest in other bonds of the United States. All the bonds belonging to said fund shall, as fast as they shall be obtained, be so stamped as to show that they belong to said fund, and that they are not good in the hands of other holders than the Secretary of the Treasury until they shall have been indorsed by him, and publicly disposed of pursuant to this act.

☞ SEC. 4. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the Government by said Central Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking-fund, the sum of one million two hundred thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding. That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the Government by said Union Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking-fund, the sum of eight hundred and fifty thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net

earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the thirty-first day of December next preceding.

SEC. 5. That whenever it shall be made satisfactorily to appear to the Secretary of the Treasury, by either of said companies, that seventy-five per centum of its net earnings as hereinbefore defined, for any current year are or were insufficient to pay the interest for such year upon the obligations of such company, in respect of which obligations there may exist a lien paramount to that of the United States, and that such interest has been paid out of such net earnings, said Secretary is hereby authorized, and it is made his duty, to remit for such current year so much of the twenty-five per centum of net earnings required to be paid into the sinking-fund, as aforesaid, as may have been thus applied and used in the payment of interest as aforesaid.

☞SEC. 6. That no dividend shall be voted, made, or paid for or to any stockholder or stockholders, in either of said companies respectively at any time when the said company shall be in default in respect of the payment either of the sums required as aforesaid to be paid into said sinking-fund, or in respect of the payment of the said five per centum of the net earnings, or in respect of interest upon any debt the lien of which, or of the debt on which it may accrue, is paramount to that of the United States; and any officer or person who shall vote, declare, make, or pay, and any stockholder of any of said companies who shall receive any such dividend contrary to the provisions of this act, shall be liable to the United States for the amount thereof, which, when recovered, shall be paid into said sinking-fund. And every such officer, person, or stockholder who shall knowingly vote, declare, make, or pay any such dividend, contrary to the provisions of this act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not exceeding one year.

☞SEC. 7. That the said sinking-fund so established and accumulated shall, at the maturity of said bonds so respectively issued by the United States, be applied to the payment and satisfaction thereof, according to the interest and proportion of each of said companies in said fund, and of all interest paid by the United States thereon, and not reimbursed, subject to the provisions of the next section.

☞SEC. 8. That said sinking-fund so established and accumulated shall, according to the interest and proportion of said companies respectively therein, be held for the protection, security, and benefit of the lawful and just holders of any mortgage or lien debts of such companies respectively, lawfully paramount to the rights of the United States, and for the claims of other creditors, if any, lawfully chargeable upon the funds so required to be paid into said sinking-fund, according to their respective lawful priorities, as well as for the United States, according to the principles of equity, to the end that all persons having any claim upon said sinking-fund may be entitled thereto in due order; but the provisions of this section shall not operate or be held to impair any existing legal right, except in the manner in this act provided, of any mortgage, lien, or other creditor of any of said companies respectively, nor to excuse any of said companies respectively from the duty of discharging, out of other funds, its debts to any creditor except the United States.

☞SEC. 9. That all sums due to the United States from any of said companies respectively, whether payable presently or not, and all sums required to be paid to the United States or into the Treasury, or into said sinking-fund under this act, or under the acts hereinbefore referred to, or otherwise, are hereby declared to be a lien upon all the property, estate, rights, and franchises of every description granted or conveyed by the United States to any of said companies respectively or jointly, and also upon all the estate and property, real, personal, and mixed, assets, and income of the said several railroad companies respectively, from whatever source derived, subject to any lawfully prior and paramount mortgage, lien, or claim thereon. But this section shall not be construed to prevent said companies respectively from using and disposing of any of their property or assets in the

ordinary, proper and lawful course of their current business, in good faith and for valuable consideration.

SEC. 10. That it is hereby made the duty of the Attorney General of the United States to enforce, by proper proceeding against the said several railroad companies respectively or jointly, or against either of them, and others, all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceeding already commenced, or that may be hereafter commenced, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to.

☞SEC. 11. That if either of said railroad companies shall fail to perform all and singular the requirements of this act and of the acts hereinbefore mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants, and franchises derived or obtained by it from the United States; and it shall be the duty of the Attorney General to cause such forfeiture to be judicially enforced.

SEC. 12. That nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal, as, in the opinion of Congress, justice or the public welfare may require. And nothing herein contained shall be held to deny, exclude, or impair any right or remedy in the premises now existing in favor of the United States.

SEC. 13. That each and every of the provisions in this act contained shall severally and respectively be deemed, taken,

and held as in alteration and amendment of said act of eighteen hundred and sixty-two and of said act of eighteen hundred and sixty-four respectively, and of both said acts.

Approved May 7, 1878. (U. S. Stats., 1877–78, p. 56.)

☞ The provisions of the Pacific Railroad acts of July 1, 1862, and July 2, 1864, were assented to and accepted by the Central Pacific Railroad Company within the time and in the mode therein provided. (Record, page 7, folio 15.)

For the sake of brevity, these last-named acts will be referred to in this brief as the Pacific Railroad acts, giving the date of passage where one, and not both, is intended; and the act of May 7, 1878, amending said acts, will be referred to as the Thurman act.

ASSIGNMENT OF ERRORS.

The Court below erred in overruling the demurrer to the bill.

ARGUMENT.

I make the following points, and shall discuss them in the order in which they are stated:

I.

The provisions of the Pacific Railroad acts, above stated, constitute a contract between the United States and the appellant corporation, *but such contract constitutes no part of the charter of said company.*

II.

The Thurman act impairs the obligation of the contract between the United States and the appellant corporation, and also the contract between the latter and the holders of its first-mortgage bonds.

III.

Congress has no power to impair the obligation of contracts, by direct action, except by the enactment of uniform laws on the subject of bankruptcies throughout the United States.

IV.

The Thurman act finds no legal support in the power "to alter, amend, or repeal," reserved to Congress in the Pacific Railroad acts.

First. Because the language, when properly construed, does not authorize the use of the power reserved for the purposes provided for in the Thurman act.

Second. Because such reservations are unconstitutional and void.

Third. Because such reservations, though expressed in broad and comprehensive terms, if not unconstitutional *in toto*, are nevertheless so far limited by several provisions of the Constitution as to exclude the provisions of the Thurman act from their operation.

V.

The validity of the Thurman act cannot be maintained upon the ground that it is a proper exercise of the jurisdiction of courts of chancery in mortgage cases:

First. Because Congress does not possess any judicial power, except in respect to impeachments, and the election, returns, qualifications, behavior, punishment and expulsion of its own members.

Second. Because the facts would not authorize a court of equity to grant the relief sought by the act.

VI.

The validity of the Thurman act cannot be maintained by reference to the power of visitation.

I.

The provisions of the Pacific Railroad acts, above quoted, constitute a contract between the United States and the Central Pacific Railroad Company, BUT SUCH CONTRACT CONSTITUTES NO PART OF THE CHARTER OF SAID COMPANY.

It is probable that this point will not be controverted by the appellee; but as it constitutes the corner-stone of my argument, it cannot be passed in silence:

"A contract may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, *and each reciprocally acquires a right to whatever is promised by the other.* The ingredients requisite to form a contract are: parties, consent, and an obligation to be created and dissolved."

Mr. Justice Washington, in the Dartmouth College case, 4 Wheaton.

Referring to the foregoing provisions of the Pacific Railroad acts, it will be found that they contain all the elements of a contract as thus defined. On one side the United States—competent to make a contract—in effect, said to the Central Pacific Railroad Company—competent to make a contract—on the other side:

"If you will build a railroad and telegraph line from the Pacific Ocean eastward, to a connection with the Union Pacific Railroad—said road to be in all respects a first-class road—and keep it in repair and use, so that it can be used at all times, but particularly in time of war, by any department of the Government, for the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores, at reasonable rates of compensation, not exceeding such as you may charge private per-

sons for the same kind of service, and allow me, at all times, the preference in the use of the road and telegraph, and pay me the amount, principal and interest, of certain bonds, (which I propose to loan you in aid of the construction of said road and telegraph,) at the maturity thereof—thirty years from date—I will grant you a right of way through my lands, and I will convey to you ten alternate sections of land, designated by odd numbers, per mile, on each side of said road, within the limits of twenty miles; and, in addition, I will give you, upon the completion by you of each section of twenty consecutive miles of said road, until it reaches the western base of the Sierra Nevada mountains, sixteen bonds, per mile of road, for one thousand dollars each, payable thirty years from date, with six per cent. interest, payable half-yearly; and for one hundred and fifty miles—east of said base of the Sierra Nevada mountains—I will give you forty-eight of said bonds, per mile: and for the remainder of the distance, between said mountains and the western base of the Rocky mountains, I will give you thirty-two of said bonds per mile—it being agreed and understood, as before stated, that you are to pay me back the amount of these bonds, principal and interest, from time to time, as they shall mature. You must have the road completed on or before the first day of July, 1876, and must keep it in repair and use thereafter, and if you fail to do so, I shall have power to take possession of the road and complete it, or keep it in repair and use, as the case may be. Now, if these terms and conditions are satisfactory to you, *file your written acceptance thereof*, under your corporate seal, with the Secretary of the Interior, within six months from this date, and thereupon they shall become a covenant and a contract between us."

In response to this proposition, the Central Pacific Railroad Company filed its acceptance as required; and thereupon the foregoing provisions of said acts became a covenant and a contract, signed, sealed, and exchanged between the United States and the appellant corporation.

In the language of Mr. Justice Miller in New Jersey *vs.* Yard (5 Otto, 115), *mutatis mutandis*, "Congress was not willing to rest this contract in the usual statutory form alone,

depending for its validity as a contract upon some action of the corporation under it to bind it to its terms; but they required of the company a formal written acceptance within six months, or else it became wholly inoperative. The company duly executed this acceptance. There was, then, the complete formal written instrument evidencing this contract, signed by the presiding officers of the two houses of Congress and the President of the United States for the one party, and the president and secretary and seal of the railroad company of the other party. It does seem as if the congressional intention was to make a contract in the same manner, and on the same terms of *equal obligation*, as other contracts are made, and not to pass a statute which they could repeal or amend the day after it was signed by the parties."

Again: This contract constitutes no part of the charter of the Union Pacific Company, and much less a part of the charter of the Central Pacific Company. It is not a *charter* granted as a *favor* by the United States, but a contract founded upon *valuable considerations* moving from these companies to the United States, and "made in the same manner, and on the same terms of *equal obligation* as other contracts are made."

The *charter* of the Union Pacific, and the whole of it, is contained in the first section of the act of 1862. The persons, therein named, are thereby created a corporation, and are clothed and vested with all the rights, powers, privileges, franchises, immunities and capacities which are usually conferred upon corporations. Had the remainder of the act never been passed, this corporation, when organized as provided in the first section, would have been perfect and complete in all its capacities, and, so far as *legal* capacity was concerned, able to construct, maintain and operate the railroad and telegraph line therein described.

Having created this corporation, in the first section, Congress, in the remaining sections, made, or proposed to make,

with it, a certain contract. This act presupposed, on the part of Congress, the existence of the corporation. This proposition the corporation was required to accept by a *corporate* act, under its *corporate* seal, which also presupposed its *corporate* existence. Unless it had already become a corporation, by force and effect of the provisions of the first section, it had no capacity to accept and agree to the terms and conditions proposed in the subsequent parts of the act. By accepting those terms it did not become, for the first time, a corporation; on the contrary, in so doing it merely exercised one of its capacities as a corporation already existing. The acceptance of these terms was not compulsory. The corporation could have declined to accept them, and in that case all its powers, franchises, and capacities would have remained to it unimpaired. It could have proceeded, so far as *legal* power and capacity were concerned, to construct, maintain, and operate the railroad and telegraph line mentioned in the first section; but it would have been compelled to do so without any aid from the United States. It was to secure the *aid* offered by the United States, that this corporation was required to file an acceptance, and not to secure any corporate rights, powers, privileges, franchises, or capacities. It seems clear, therefore, that all of the provisions of this act which relate to a right of way, land grant, and subsidy bonds on the one hand, and services to be rendered and moneys to be repaid on the other hand, constitute a contract separate and distinct from the charter of the company—a contract which might have been made or not, at the option of the parties.

In this respect the case of the Union Pacific is strong enough, but the case of the appellant corporation—the Central Pacific—is still stronger. Referring to the close of the ninth section of the Pacific Railroad act of 1862, it will be seen that the appellant corporation is described in these words: "The Central Pacific Railroad Company of California, *a corporation existing under the laws of the State of California*,

are hereby authorized, &c." Referring to the second paragraph of the bill of complaint in this case, (page 2 of the record,) the following averment will be found: "And thereupon your orator complains and says that on or about the 28th day of June, 1861, the Central Pacific Railroad Company of California was duly organized and incorporated as a railroad corporation under and pursuant to the laws of the State of Callfornia, in, under and by the name aforesaid, for the purpose of constructing and operating a certain line of railroad from the city of Sacramento to the eastern boundary of the State of California, and continued to be and exist as such corporation until the same became merged in and was succeeded by a certain other corporation under the name of the Central Pacific Railroad Company, as hereinafter stated." Thus it appears that the appellant corporation not only derived its corporate existence, powers, franchises, and capacities from the State of California, but that it had so obtained them, and had been in the full enjoyment thereof for more than a year prior to the passage of the Pacific Railroad act of 1862. In view of these conditions, it cannot be said that the appellant corporation is in any sense a constituent of the United States; it is the constituent of the State of California, by which it was created.

But it may be claimed here, as it has been claimed elsewhere, that in respect to its railroad lying outside of the boundaries of the State of California, the appellant corporation is a constituent of the United States, and from them derives its corporate powers, franchises, &c., so far as they are employed, or exercised, to the east of the eastern boundary of California. This claim is founded upon a misapprehension of both law and fact.

Congress has no power of addition or substraction in respect to the powers, franchises, &c., of a State corporation. In respect to them, Congress is as powerless as the Queen of England. As Congress cannot create a State corporation, so they cannot regulate, increase or diminish its powers.

As to a State corporation, Congress possesses none of the attributes of sovereignty, and whatever rights the United States may acquire, in respect to such a corporation, must be acquired by contract with such corporation and by the consent of the State; and the attitude of the United States, in respect to such contract, is not that of a sovereign, but the same as the attitude of the humblest citizen, under a similar contract. (Davis *vs.* Gray, 16 Wall., 233.) Congress, therefore, could confer no power upon the appellant corporation to extend its road east of the eastern boundary of California. They could consent to its doing so—if authorized by its sovereign, the State—and by consenting, enable it to exercise its corporate powers, &c., within the territory of the United States; but to consent is not to create—to consent to the exercise of powers and franchises, granted by one sovereign, within the domain of another sovereign, is not a grant of such powers or franchises by the latter sovereign. Such consent is a mere license, a mere act of comity, and is in no sense the source of the powers or franchises in question; their source remains the same, after the consent is given, that it was before.

This act of comity is not unusual. Familiar examples are found in the history of insurance companies. Companies incorporated under the laws of one State are, by comity, allowed to transact their business in other States. They are allowed to exercise all their corporate powers in States in which, in a strict legal sense, they have no corporate existence. They are allowed to make contracts, and enforce them, and generally to do and perform any and all acts which, under their charter, they may do in the State by which they are created. Yet it has never been supposed, that, by reason of such comity, they are indebted, in any sense, to such States for any of the powers or privileges which pertain to their corporate character. Wells, Fargo & Co. is a corporation organized under the laws of Colorado. It carries on its business throughout the United States, yet

it has never been supposed that it derives its corporate powers, franchises, &c., from any source except Colorado. Hundreds of corporations have been formed under the laws of California for the purpose of mining on the Comstock Lode in Nevada, yet it has never been supposed that they exist or possess any of their corporate powers under the laws of the latter State. The Pacific Mail Steamship Company are incorporated under the laws of the State of New York. Like the appellant corporation, they have been subsidized by the United States. Their ships, in their course, encircle half the world. They lease, or own, wharves in Central America, in San Francisco, and in China; and in all these places they make and enforce all other contracts necessary to the transaction of their business; yet it has never been supposed that they obtain any of their corporate powers from the United States, or from the ruling powers of any, or either, of the places above named. It is by comity, and by comity alone, that they are allowed to exercise, in those places, powers which are derived solely from the State of New York.

The only difference between these cases, and the case of a railroad corporation, relates to the power of eminent domain, which is not necessary, although convenient, to the existence of a railroad corporation. Its exercise is not the exercise, strictly speaking, of corporate power. It is a power which the sovereign only can exercise, and whoever else is allowed to exercise it does so as an agent. There is, then, no legal reason why a State may not create a corporation to construct and operate a railroad in another State with the consent or license of such State.

It was upon this theory that the United States, the State of California, the appellant corporation, and, at a later date, the State of Nevada acted. Instead of bestowing, or attempting to bestow, corporate powers upon the appellant corporation, Congress did not even propose to construct this road and telegraph line within the State of California without

the consent of the State. By the tenth section of the act of 1862, the Union Pacific Company, in a certain event, were authorized to continue their road and telegraph line through the State of California "with the consent of the said State." Thus it appears that Congress did not propose, so far as the State of California and her corporation were concerned, to do anything in the premises without their assent and co-operation; and the proposition of the United States could not have been accepted or the contract carried out without the authority and consent of the State; and accordingly the consent of the State was given, and the requisite power and authority was conferred upon the appellant corporation by the passage of the following act of the Legislature, which will be found in the Statutes of California for 1863–4, at page 417:

An act to aid in carrying out the Pacific Railroad and Telegraph Act of Congress and other matters relating thereto.

The people of the State of California, represented in Senate and Assembly, do enact as follows:

SEC. 1. Whereas, by the provisions of an act of Congress, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July 2, 1862," the Central Pacific Railroad Company of California is authorized to construct a railroad and telegraph line in the State of California, and in the territories lying east of said State towards the Missouri River; therefore *to enable* the said company more fully and completely to comply with and perform the provisions and conditions of said act of Congress, the said company, their successors and assigns, *are hereby authorized and empowered, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them to construct, maintain, and operate the said railroad and telegraph line not only in the State of California, but also in the said territories lying east of and between said State and the Missouri River,* with such branches and extensions of said railroad and telegraph line, or either of them, as said company may deem

necessary or proper; and also the right of way for said railroad and telegraph line over any lands belonging to this State, and on, over, and along any streets, roads, highways, rivers, streams, waters, and water-courses, but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same; *and also the right to condemn and appropriate to the use of said company such private property, rights, privileges, and franchises as may be proper, necessary, or convenient for the purposes of said railroad and telegraph*, the compensation therefor to be ascertained and paid under and by special proceedings, as prescribed in the act providing for the incorporation of railroad companies, approved March 20, 1861, and the acts supplementary and amendatory thereof; *said company to be subject to all the laws of this State concerning railroad and telegraph lines*, except that messages and property of the United States, of this State, and of the said company, shall have priority of transportation and transmission over said line of railroad and telegraph; *hereby confirming to and vesting in said company all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said act of Congress;* hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted.

SEC. 2. This act shall take effect and be in force from and after its passage.

In 1866 the State of Nevada (the Territory of that name having in the meantime become a State) passed a similar act, *mutatis mutandis*. Being in all essential respects similar, it is not deemed necessary to print it here. It will be found in the laws of that State for 1866, chap. CXII.

Thus it seems to me to be clear, that all the corporate powers, franchises, and capacities of the appellant corporation come from the State of California, and that it has only received from the United States a mere consent, or license, to enjoy and exercise them within their territories. If this be so, the character or nature of the contract between the United States and the appellant corporation is freed from all doubt—it in no respect resembles a *charter* based upon

the favor and grace of the United States as a sovereign, but it is an ordinary business contract, supported on both sides by valuable considerations, in which the United States appear divested of their sovereignty and standing upon the level of a business or trading corporation, possessing only such powers and rights as such a contract lawfully confers.

The Commonwealth vs. *The Proprietors of New Bedford Bridge Co.*, 2 Gray, 339.

Davis *vs.* Gray, *supra.*

Again. That this contract constitutes no part of the charter of the appellant corporation becomes further apparent by referring more particularly to the precise terms of the contract. The last clause of the tenth section is in these words:

"Each of said companies shall file their acceptance of the *conditions* of this act in the Department of the Interior within six months after the passage of this act."

What are the *conditions* here referred to? The answer is found by referring to the sixth section, which is in these words:

"That the grants aforesaid are made upon *condition* that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph lines, and transport mails, troops, munitions of war, supplies, and public stores upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid; * * * and after said road is completed, until said bonds and interest are paid, at least five per centum of the net

earnings of said road shall be annually applied to the payment thereof."

In addition to these there were other conditions: as to the class of the road to be built; as to the progress and date of completion; as to the power of Congress to regulate tolls in a certain event, and other conditions not necessary to mention.

Now, what were the "grants" which were made upon these conditions, mentioned in the sixth section? The answer is found in the 2d section, which grants a right of way; in the 3d section, in which the land grant is made; and in the 4th and 5th sections, which contain the loan or grant of subsidy bonds. The corporate franchises of the company are not mentioned or included, and, therefore, constitute none of the grants to which these conditions are annexed. The contract, then, consists of these grants upon the one side and these conditions upon the other, and of nothing else.

My object in thus establishing the true nature and legal character of this contract, will become more apparent when I come to the discussion of the nature and scope of the power "to alter, amend and repeal" reserved to Congress in the Pacific railroad acts. In the view which I shall take of those questions, the fact that this contract constitutes no part of the charter of the appellant corporation will become an important factor.

II.

The Thurman act impairs the obligation of the contract between the United States and the appellant corporation; and also the contract between the latter and the holders of its first-mortgage bonds.

The only part of this contract which is changed by the Thurman act is that which relates to the subsidy bonds. The undertaking, on the part of the United States, as we

have seen, was to deliver to the appellant corporation a certain number of their bonds *pari passu* with the construction of the road. These bonds were for one thousand dollars each, payable thirty years from date, with interest at the rate of six per centum per annum payable half-yearly. The undertaking on the part of the appellant corporation, was that the United States might retain *one-half* of any moneys that might become due to it for services rendered the Government and apply the same to the payment of the subsidy bonds—the remaining half to be paid as it should be earned and fall due by the United States to the appellant corporation; also to apply annually to the payment of said bonds five per cent. of the *net earnings* of its road, after the same should be completed, and finally to pay to the United States the remainder of said bonds, principal and interest, at the maturity of said bonds, namely, thirty years after date. Such was the contract as it has been construed by this Court.

United States vs. *Union Pacific Railroad Company*, 91 U. S. Repts., 78.

It should be borne in mind, that what would constitute net earnings, within the meaning of this contract, became a judicial question—the meaning of those words not being defined in the contract.

Referring to the first section of the Thurman act, it will be seen that it contains a definition of the words "net earnings." It provides that after the 30th day of June, 1878, "the net earnings mentioned in said act of 1862, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively, the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first-mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said

companies respectively for interest upon any other portion of their indebtedness." * * *

First. One important change, here made in the contract, consists in substituting "net earnings of the *company*" for "net earnings of the *road*."

Referring to the bill of complaint in this case (Record, pages, 8, 9, folios 18, 19) it will be seen that the appellant corporation is successor by consolidation to the Western Pacific Railroad Company, the Central Pacific Railroad of California, the California and Oregon Railroad Company, the San Joaquin Valley Railroad Company, and the San Francisco, Oakland, and Alameda Railroad Company—the last three representing roads which are not mentioned in the Pacific Railroad acts and were not constructed under said acts, nor aided by the subsidy bonds in question. The earnings of all these roads now constitute a part of the earnings of the appellant corporation, and, under the foregoing provisions of the Thurman act, are wrongfully included in the contract and made to contribute to the payment of these subsidy bonds. Under the original contract the appellant corporation is only required to apply to the payment of these subsidy bonds, five per cent. of the net earnings of the roads which were built under the Pacific Railroad acts by its first two constituents, namely the "Central Pacific Railroad Company of California" and the "Western Pacific Railroad Company." Thus the change made by the Thurman act adds largely to the burdens of the appellant corporation, and in respect to the earnings of its non-aided roads amounts to *confiscation*.

Second. Another important change in the contract is made by the definition of "net earnings" given in the foregoing provisions of the Thurman act. It is possible that the courts, in construing the original contract, may define these words in the same way. In that case, this definition will work no change in the contract, but otherwise it will; and in any case Congress in thus attempting to construe (if it is to be re-

garded as a construction and not as an alteration) the contract has usurped judicial power. The construction of a contract, whether it be between private parties or between private persons on the one hand and the Government on the other, is a judicial and not a legislative act. Speaking to this question, in the case of *The Commonwealth* vs. *Proprietors of New Bedford Bridge Company* (2 Gray, 339) the court said:

"The Commonwealth and the defendants are but parties to a contract. Each has equal rights and privileges under it, and neither can interpret its terms authoritatively so as to control and bind the rights of the other. The Commonwealth has no more authority to construe the charter than the corporation. By becoming a party to a contract with its citizens the Government divests itself of its sovereignty in respect to the terms and conditions of the contract and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contracting with the Government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question belongs exclusively to the *judicial* department of the Government. The Legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial powers which would be contrary to the elementary principles of our Government."

Again: Under the original contract, the United States are allowed to retain only one-half of the compensation which may become due from time to time to the appellant corporation for services rendered for the Government, and are required to pay over the remaining half to the appellant corporation. Under the second section of the Thurman act the United States are allowed to retain this remaining half also to feed the sinking fund provided for in the next section. Thus in this respect the burden imposed upon the appellant corporation by the original contract is *doubled* by the change made in the Thurman act.

Again: The only security for the payment of the subsidy bonds required in the original contract was a second mortgage "on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be (were) issued." (Pacific Railroad Act, 1862, sec. 5; Pacific Railroad Act, 1864, sec. 10.)

The only security which the first-mortgage bondholders of the appellant corporation acquired under this contract was a first mortgage upon the same property.

The Thurman act provides an additional security for the payment of the subsidy bonds, first-mortgage bonds, and any other debts having lawful priority over said subsidy bonds, (Secs. 3, 4, 7, and 8,) by creating a sinking fund in the Treasury of the United States, which is to be fed by carrying to its credit, on the first day of February in each year, half of the compensation for services rendered for the Government, (which, under the original contract, the United States were required to pay over to the appellant corporation,) and by requiring the appellant corporation to pay into said fund, on the same day in each year, "the sum of one million and two hundred thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road, payable to the United States under said act of 1862, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to *twenty-five* per centum of the *whole* net earnings of said railroad *company*, ascertained and defined as hereinbefore provided, for the year ending on the 31st day of December next preceding."

These sections make most important changes in the contract, and add largely to the burdens and obligations of the appellant corporation.

First. The appellant corporation is required to apply annually to the payment of the subsidy bonds the sum of

$1,200,000, or so much thereof as will, when added to the Government earnings and five per cent. of the net earnings of the road, described in the Pacific Railroad acts, amount in the aggregate to twenty-five per cent. of all the net earnings of the appellant corporation, including the earnings of the three roads above mentioned, which are not included in the original contract, and over which Congress has no control, either as sovereign, or by virtue of said original contract, or otherwise.

Second. The appellant is required to furnish security for the payment of its first-mortgage bonds which it has never agreed to furnish; and also to furnish security for the payment of its other debts, if any, which have priority over the subsidy bonds; and, lastly, it is required to furnish security for the payment of the subsidy bonds—*the security required being equivalent to payments upon debts years in advance of the time when they will fall due.*

Third. The appellant corporation is required to apply to the payment of the subsidy bonds the earnings of roads upon which the United States have no lien under the original contract; and also to apply to the same object all moneys which may become due to it for services rendered for the Government on such roads, notwithstanding the United States have no contract or other relation with the appellant corporation in respect to such roads.

Fourth. Under the original contract, these subsidy bonds may be paid, "wholly or in part, in the same or other bonds, Treasury notes, or other evidences of debt against the United States;" but under the changes here made they can be paid only in money.

Again: Under the original contract it was lawful for the appellant corporation to declare dividends. By the sixth section of the Thurman act, such action under the conditions therein specified, is made a crime punishable by fine and imprisonment.

By the 11th section it is provided that if the appellant

corporation shall fail for the space of six months to comply with the provisions of the act, or *any of the provisions of the Pacific railroad acts*, such failure shall operate as a forfeiture of all the rights, grants, and franchises derived or obtained by it from the United States.

Here are imposed penalties and forfeitures for the non-performance of acts required in the Pacific railroad acts, which penalties and forfeitures were not imposed by said acts, notwithstanding it is well settled that such additional penalties and forfeitures cannot be lawfully imposed, or, if imposed, are void. (Gaines *vs.* Buford, 1 Dana, 486.)

Lastly. By the 10th section the appellant corporation, in all cases arising under this act and the Pacific Railroad acts, is required to submit to rules of pleading and practice, and of judicial decision and judgment not observed by the courts in the trial of other cases.

To add argument to the foregoing statement, for the purpose of showing that the Thurman act impairs the obligation of the original contract between the appellant corporation and the United States, and also that it impairs the contract between it and its first-mortgage bondholders, would be a waste of time. However disguised under specious pretexts, the object and purpose of the act is to coerce, by legislative action alone, the appellant corporation into the payment of money years in advance of the time fixed and agreed upon in the original contract. Speaking to this question in the case of *Green* vs. *Biddle*, (8 Wharton, 84,) this Court said:

"The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or *accelerating* the period of performance which it prescribes, imposing *conditions not expressed* in the contract, or dispensing with those which are however minute or apparently immaterial in their effect upon the contract of the parties, impairs it. Upon this principle it is that if a creditor agree with his debtor to

postpone the day of payment, or in any other way to change the contract without the consent of the surety, the latter is discharged, although the change was for his advantage."

In another place this Court has also said:

"One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching, in any respect, on its obligation—dispensing with any part of its force." (*Planters Bank* vs. *Sharp*, 6 How., 327.)

To the same effect is the language of Mr. Justice Field in the Legal Tender cases, (12 Wall., 661.)

"A law which changes the terms of the contract, either in the *time* or *mode* of performance, or imposes *new* conditions, or *dispenses* with those expressed, or authorizes, for its satisfaction, something different from that provided, is a law which impairs its obligation, for such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement."

This Thurman act changes the time and mode of performance; it imposes new conditions, and dispenses with those expressed; it relieves one party from performing the original stipulations and prevents their legal enforcement by the other party.

III.

Congress has no power to impair, by DIRECT ACTION, *the obligation of a contract, except by the enactment of uniform laws on the subject of bankruptcies throughout the United States."*

I use the words "by direct action" to exclude from this discussion such incidental impairments as may result from the exercise of the express powers conferred upon Congress—such as the money and war powers. The exercise of these powers may—as suggested in the legal-tender cases (12 Wall., 549,)—"*indirectly* impair the obligation of con-

tracts;" but the impairment complained of in this case does not belong to that class.

In discussing this point I also exclude from consideration the power to "alter, amend, or repeal," reserved to Congress in the Pacific railroad acts.

It seems to me to be so clear, both upon principle and authority, that Congress does not possess this power, that I should not feel at liberty to discuss it, but for the fact that the debates in Congress upon the Thurman act show that it was there claimed—openly by some and impliedly by others—that Congress has been vested by the American people with this most extraordinary power—a power destructive to one of the principal purposes for which social compacts are made among all civilized and enlightened nations. In the course of the debate the Senator from Ohio (Mr. Thurman) said:

"I shall not now speak upon the power of Congress to pass this bill. * * * For myself, I have only to say that to me nothing in the world is clearer than that we have the right, and would have it if there was no reservation in the charter of a right to alter, amend, or repeal."

And the Senator from Illinois, (Mr. Davis) said:

"Conceding that the constitutional prohibition touching the obligation of contracts is binding upon Congress, *which it obviously is not*, (for it is in express terms confined to the States,) the question arises," &c.

Similar language was employed by other Senators.

When men who occupy the exalted position of Senators of the United States stand up in their places and assert the existence of such a power, no further excuse is needed for challenging, in this tribunal, the truth of the assertion. Here, and here only, can the question be definitely settled.

Speaking of contracts, and the important part they play in human affairs, this Court has said:

"A compact lies at the foundation of all national life.

Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellow-man. They are the springs of business, trade, and commerce. Without them society could not go on. *Spotless faith in their fulfilment, honors alike communities and individuals.* Where this is wanting in the body politic, the process of descent has begun, and a lower plane will be speedily reached. To the extent to which the defect exists among individuals there is decay and degeneracy. As are the integral parts so is the aggregated mass. Under a monarchy or an aristocracy order may be upheld and rights enforced by the strong arm of power. But a republican government can have no foundation other than the virtue of its citizens. Where that is largely impaired all is in peril. It is needless to lift the veil and contemplate the future of such a people. History but repeats itself. The trite old aphorism that 'honesty is the best policy' is true alike of individuals and communities. It is vital to the highest welfare."

Farrington *vs.* Tennessee, 5 Otto, 682.

This is no exaggeration, and in view of the important part which contracts fill in the economy of nations, the proposition that they have been left without constitutional protection against the wanton aggressions of Congressional or legislative power cannot be accepted as true, except upon the most conclusive testimony. A large part, if not the largest part, of the wealth of the people is in the form of contracts, and it will be strange if, upon examination, it shall be made to appear that in a constitution so framed as to afford ample security to life, liberty, and property against the encroachments of legislative power, contracts between private parties, or between private parties and the Government—being one kind of property—have been left without any protection whatever, and that the rights of parties to them have been left "exposed to all the risks arising from the corrupt or ill-judged use of misguided power." Still stranger will

this result appear, when we reflect that the greatest care has been taken in the instrument, through which this supposed power has been derived, to prohibit its use to all the States, upon the theory that it is hostile to the principles of republican government.

Ordinarily, in all forms of government of which legislative bodies form a part, such bodies, by reason of their inherent nature, absorb all the law-making power; and as such power may become mischievous, even among the most enlightened people, it has been the practice in modern times, and especially in America, to impose restrictions upon its exercise. In all such cases, whoever challenges the validity of a law enacted by such bodies, is required to put his finger upon the clause of the Constitution which *denies* the power in question. Such is the rule in respect to all State laws. But the opposite rule prevails in respect to the laws of Congress, arising out of the fact that that body possesses no inherent power, but only such as has been granted to it by the Constitution of the United States, either expressly or by necessary implication. Hence, whenever the validity of a law of Congress is challenged, whoever maintains its validity must put his finger upon the clause of the Constitution which *grants* to Congress the power in question. The language of State constitutions in this respect is: "All legislative powers, *not herein denied or prohibited*, shall be vested in a legislature." "The language of the Federal Constitution is: "All legislative powers *herein granted* shall be vested in a Congress of the United States." (Art. 1, sec. 1.) "The powers not *delegated* to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or to the people." (Amendments, Art. X.) The meaning of this latter clause being (so far as the present question is concerned) that powers which are not granted to the United States, and which are denied to the States, remain in the people, and cannot be exercised either by the United States or the States.

It is the duty, then, of those who maintain the validity of the Thurman act to put their finger upon the clause of the Constitution which confers upon Congress power to impair contracts. We search the Constitution in vain for such a power, yet the Constitution is not silent upon the subject of contracts. It contains two clauses which deal specifically with that subject. They are, first, "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States;" and second, "No State shall pass any law impairing the obligation of contracts."

In the first clause the power to impair contracts is expressly granted, but the grant is confined to the laws there named, to the exclusion of all other laws, as much so as if there had been added the words: "But Congress shall not have power to pass any other laws which shall impair the obligation of contracts." The interpretation of this clause is controlled by the maxim: *Expressio unius exclusio alterius est.* Indeed, if the power in question exists, the insertion of this clause was needless.

If this be the proper construction of the first clause, it follows that, were it otherwise admissible, no implication in favor of the power can arise from the second clause, for a clear and obvious implication cannot be overturned by a doubtful one. But no such doubtful implication arises from this second clause. The Constitution expressly grants certain powers to the United States, and expressly denies certain powers to the States. No prohibition to the States results from the former, nor does any grant to the United States result from the latter. This is illustrated by the well-settled rule that the grant to Congress of power to establish uniform laws upon the subject of bankruptcies does not, by implication, include a denial of similar power to the States. Nor does the prohibition upon the States to make anything but gold and silver a legal tender in the payment of debts include, by implication, a grant of power to Congress to do the act prohibited. Whatever power Congress may possess

upon the subject of making other than gold or silver a legal tender, the power does not come, by implication, from this prohibition upon the States, but from the clause which empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." If the clauses of the Constitution, which are prohibitory upon the States, are to be read as conferring, by implication, upon the United States the powers therein prohibited, the legal tender question, with which this court so long wrestled, would have been of easy solution.

The absurdity of this contention, on the part of the advocates of the Thurman act, that the power to impair the obligation of contracts results to Congress from the clause which prohibits its exercise by the States, may be further illustrated. The Constitution of the United States and the constitutions of nearly all the States, contain a limitation upon the power of eminent domain. They provide that private property shall not be taken for public use without just compensation. Were any one to contend that a power to take private property for private use—to take the property of A and give it to B—results, by implication, from this prohibitory clause, his sanity would become a question of doubt and uncertainty; yet the argument in support of such a contention rises to the same level upon which, on the score of logic and right reason, the contention in question rests.

This question was considered by Mr. Chief Justice Chase in *Hepburn* vs. *Griswold*, (8 Wall., 623.) Speaking of the clause of the Constitution which prohibits the States from impairing the obligation of contracts, he said:

"It is true that this prohibition is not applied in terms to the Government of the United States. Congress has the express power to enact bankrupt laws, and we don't say that

a law made in the execution of any other express power which, *incidentally only*, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

"But we think it clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, *we cannot doubt that a law not made in pursuance of an express power*, which necessarily and in *its direct operation* impairs the obligation of contracts, is inconsistent with the spirit of the Constitution."

I find nothing in the Legal Tender Cases (12 Wall., 457,) which conflicts with this doctrine. It is true that a contrary result was reached in the latter cases, but it was not based, in any degree, upon the doctrine that Congress has the power, by *direct* action, to impair the obligation of contracts. The whole argument there made, was to show that Congress, in the exercise of the war power, had power to declare United States Treasury notes a legal tender—the power being derived from the last clause of the eighth section of the first article of the Constitution, which contains the grant of auxiliary powers. In answer to the point made by counsel, that the legal-tender acts impaired the obligation of contracts, this Court said: First, that they did not have that effect in a constitutional sense; second, that if they did, the effect resulted incidentally from the exercise of express powers, and it could not, therefore, be considered a valid objection to the validity of the legal tender acts; but it was nowhere stated, in the opinion of this Court, either directly or by implication, that Congress has power, while not engaged in the exercise of their express powers, to enact a law which is designedly intended to impair a particular contract. It is true, that in the debate on the Thurman act in the Senate, these cases were cited by the friends of the measure as sustaining their contention, that Congress has this mooted

power; but, except to a jaundiced eye, they do not contain a word which supports the doctrine for which they contended.

Mr. Duer, in his Lectures on Constitutional Jurisprudence, (page 356,) speaking to this question, says:

"By *contracts*, in the sense of the Constitution, we are to understand every *executed* agreement, whether between individuals or between individuals and a State, by which a right is vested, and also every *executory* agreement which confers a right of action or creates a binding obligation in relation to subjects of a valuable nature, which may be asserted in a court of justice; but it does not comprehend the political relations between a government and its citizens. The power possessed by a State Legislature, to which everything not expressly reserved is granted, and the temptations to abuse that power render express restrictions, if not absolutely necessary, at least prudent and useful; *but the National Legislature has no power to interfere with contracts except where it is expressly given to it.*"

I therefore submit that this alleged power finds no countenance in either of these clauses. Its existence or non-existence, then, so far as they rest upon the letter of the Constitution, must be determined by reference to the clause in relation to reserved powers. Under the plain and obvious meaning of that clause, powers which are not delegated to the United States and are denied to the States are, so far as the United States and the States are concerned, non-existent. The power in question belongs to this class, and, by the very terms of this clause of the Constitution, *it is reserved to the people*, where it ought to remain forever, if it is to be regarded in any sense as a governmental power.

Again: But the non-existence of this power does not rest solely upon the interpretation of the mere *letter* of the Constitution. There is a principle of interpretation which underlies all laws, and which is inherent in all American constitutions, whether expressed or not, which requires that they shall be read so as to foster and secure the great objects for

which governments are established among men—the objects for which the barons of England fought at Runymede, and secured to themselves and all English-speaking people by wresting *Magna Charta* from the hands of King John—the objects sought by the Convention at Philadelphia which proclaimed to the world the independence of the American colonies, in words which still ring in our ears—the objects which are either stated or implied in every American constitution—mutual protection and security for life, liberty, property, and the pursuit of happiness. The language of *Magna Charta* is: "*Nec super eum ibimus, nec super mittimus, nisi per legale judicium parium suorum, vel per legem terræ.*" (Neither will we pass upon him or condemn him but by the lawful judgment of his peers, or by the law of the land.)

The language of the Declaration of Independence is:

"We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

"The pursuit of happiness" includes the acquisition, possession, and enjoyment of property in whatever form it may exist. (*Bartemyer* vs. *Gowan*, 18 Wall., 129.)

Such being the objects for which governments are instituted among men, neither constitutions nor laws are to be read so as to defeat them or put them in jeopardy. To so read them would be to antagonize the objects for which they have been established—to convert a shield into a weapon of offense, and expose to invasion and destruction the inalienable rights which it was intended to protect.

Judicial utterances upon this subject have been neither

few nor of uncertain sound. In *Calder* vs. *Bull*, (3 Dallas, 388,) this Court said:

"The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal and State Legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power: as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the first great principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compacts based on republican principles must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action; or, in other words, for an act which, when done, was in violation of no existing law; *a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own case; a law that takes property from A and gives it to B!* It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that they have done it. They may command what is right and prohibit what is wrong; but they cannot change innocence into guilt or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that a Federal or State legislature possess such powers if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in all free republican governments."

This Thurman act falls within each of the three classes

here mentioned: It is a law which impairs the private contract between the United States and the appellant corporation: it is a law which makes the United States a judge in their own case: and it is a law which takes the property of the appellant corporation and gives it to the United States.

Especially is it true that this law takes the property of the appellant corporation and gives it to the United States, so far as it acts upon the earnings of roads which were not constructed under the provisions of the Pacific Railroad acts, namely, the California and Oregon, the San Joaquin Valley, and the San Francisco, Oakland and Alameda roads.

In *Fletcher* vs. *Peck*, (6 Cranch, —,) Chief Justice Marshall used the following language:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any are to be prescribed where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation.

"To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of a legislative power, is well worthy of serious reflection."

In the case of *Loan Association* vs. *Topeka*, (20 Wall., 662,) the following language is found:

"The theory of our Government, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these Governments are all of limited and defined powers. *There are limitations on such power which grow out of the essential nature of all free governments*—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Again: But the non-existence of this power does not rest solely upon the fact that it finds no warrant in the letter of the Constitution, nor upon the further fact that it is hostile

to the fundamental principles of free government; it is also repugnant to the express letter of the Constitution. Its non-existence is affirmatively established by that clause of the Constitution which declares that no person shall be deprived of life, liberty or *property* without due process of law—"due process of law" being "law in its regular course of administration through courts of justice," (2 Kent, 13,) and not a mere act of legislation. (*Taylor* vs. *Porter*, 4 Hill, 145.) Principles so hostile to each other cannot exist in the same Constitution.

Contracts are property. A large proportion of the wealth of the country exists in the form of contracts. They usually stipulate for the payment of money, and when they do not, they stipulate for values in some other form, which values, equally with money, are property. To exclude them from such protection as this clause of the Constitution affords to other kinds of property would be to draw a line of distinction where none exists in fact or principle. The ordinance for the government of the northwest territory, (which was adopted by the Congress of the Confederation during the time the Constitution was being framed,) contained a declaration of fundamental principles, among which was this: "And in the just *preservation* of rights and *property*, it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements *bona fide*, and without fraud, previously formed."

Here contracts are classed as property, where, from their intrinsic nature, they belong, and this classification was carried into the Constitution, and finds expression in the clause which protects them from legislative interference.

In any event, it is manifest that this clause of the Consti-stitution protects the appellant corporation against the action of the Thurman act, (unless that act is held valid upon grounds which are to be considered hereafter,) for it seeks

to deprive the appellant corporation, by direct action and without the intervention of the courts—that is to say, without due process of law—of its property in the form of money, to an amount which may equal the sum of $1,200,000 annually. And, in this aspect of the case, the Thurman act is also repugnant to that clause of the Constitution which provides that private property shall not be taken for public use without just compensation. Indeed, it is manifest that all these provisions of the Constitution were designed to place private rights and private property of all kinds beyond the reach of mere legislative action, secure from all molestation or interference, except such as may come through the action of the courts of justice. In the language of this Court, in *Bartemyer* vs. *Iowa*, (18 Wall., 129:) "It has become the fundamental law of this country that life, liberty, and property (which include the 'pursuit of happiness') are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether *national* or *local*, so that he cannot be deprived of them without *due process of law*."

IV.

The Thurman act finds no legal support in the power "to alter, amend, or repeal," reserved to Congress in the Pacific Railroad acts.

A proper construction of the clauses of the Pacific Railroad acts which contain this reservation, affords no support for the Thurman act. The power in question was reserved for specific purposes, and the purpose to which the power is attempted to be applied by the Thurman act is not among them; on the contrary, the purpose of that act is entirely different, and is in no respect the same, or even cognate. The object of the Thurman act is to coerce, under the specious guise of a sinking fund, the payment of a debt by

yearly instalments twenty years in advance of the time when it will become due. That neither the debt nor any part of it will become due until some time in the far future has been determined by this Court. (*United States* vs. *Union Pacific Railroad Company*, 91 U. S. Repts., 78.) Such being the object, I submit that it is not within the scope of the power in question.

This reservation is found in the 18th section of the act of 1862, and the 22d section of the act of 1864. The former reads as follows:

"* * * And the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time—having due regard for the rights of said companies named herein—add to, alter, amend, or repeal this act."

The latter reads as follows:

"*And be it further enacted*, That Congress may at any time alter, amend, or repeal this act."

A careful perusal of the act of 1864 shows that the construction and continuous working of this railroad and telegraph line was deemed by Congress of vital importance. Every precaution that could be taken, under the circumstances, to secure these objects was taken. In case of failure on the part of these companies to construct the line, or to keep it in repair and use, a forfeiture of all the grants made to them in aid of the road was to follow, and the road and all its fixtures and property of every kind was to be taken possession of by the United States. In keeping with this policy, and in furtherance of it, the reservation in the act of 1862 was made. To carry out this policy further legislation by Congress might be required. But beyond such

legislation there would be no occasion to go, and it was not proposed to do so. That it was not intended to go beyond such legislation as might be necessary to secure the construction and continued use of the line is conclusively shown by the fact that the declared intent is in express words confined to those purposes.

That such are the limits to the reservation contained in the act of 1862 will not be denied; but it will be contended that the reservation contained in the act of 1864 is without limit, and it therefore enables Congress to change any of the provisions of those acts at pleasure—not only those which relate to the corporate charters or rights of these companies, but also such as relate to contract rights which do not come from or depend upon their charters, but find their foundation in a separate and independent contract, founded on valuable considerations moving from said companies to the United States; that is to say, the contract which relates to the grant of lands and loan of bonds by the United States, and the undertakings of these companies in relation to keeping the road in repair and use, the transmission of dispatches, the transportation of mails, and the repayment of the Government loan.

But this does not follow, and those who contend that it does overlook, or misapply, a well settled canon of statutory construction. These acts are in *pari materia*—one is an amendment of the other, and they both deal with the same subject-matter. They are, therefore, to be read as one act, as if they had been passed at the same time, as a whole, and not as if passed at different times as separate acts. (Prescott *vs.* Railroad Company, 16 Wall., 603.) Such being the case, the limitations imposed upon the exercise of this power in the act of 1862 must be read as also applying to the reservation made in the act of 1864. Neither expressly, nor by necessary implication, does the clause in question, in the act of 1864, repeal the clause in question in the act of 1862. Hence to read the two acts otherwise than

as contended would be to erase an entire clause from the act of 1862, which is not permitted by any rule of construction. Courts cannot even supply a *casus omissus*, (United States *vs.* Union Pacific *supra*;) much less can they erase words—or as in this case whole sentences—in the construction of statutes. The rule upon this subject is plain and well settled. Some meaning must be accorded to every word and clause; apparently conflicting words or expressions must be reconciled if possible, and neither can be wholly disregarded. There is no difficulty in the application of this rule to this case, and its application leaves no foundation, so far as this reserved power is concerned, upon which the Thurman act can stand.

The objects and purposes of the act are fully recited in the preamble; that they are truthfully recited fully appears in the body of the act. We search the preamble in vain for any of the grounds upon which Congress was to be allowed to invoke the aid of this power. Nothing is said as to the condition of this railroad and telegraph line. It does not recite that these companies have failed to construct the road according to contract; or that they have failed to keep it in working order; or to secure to the Government at all times the use and benefits of the same for postal, military and other purposes; or, that through the default of these companies, the public interest and welfare has suffered in any respect; or that in any respect whatever these companies have failed to perform their contract to the letter and the spirit. If we look into the body of the act, we find that its provisions have no relation whatever to these subjects, but that they are devoted to an entirely different matter, namely, the security and collection of a debt not yet due.

In the debates upon this act it was contended by one of its advocates, (the Senator from Michigan, Mr. Christiancy,) that the reservation in the act of 1864, being without any express limitation in that act, must be taken as an enlargement of the previous reservation and be adopted as the

measure of this power, because it was the expression of the last will of Congress, and he attempted to fortify his position by arguing that this enlargement of the power was exacted by Congress as a condition upon which the additional grants, provided for in the act of 1864, should be made. However plausible this theory may be it will not bear close inspection. It is but the argument, that the latter clause repeals the prior clause, which has been already answered, in a different dress. There is no difference between the enlargement of a limited power into an unlimited power and a repeal of a grant of the former by a grant of the latter. Nor is it true, under the rule of interpretation, which he conceded, (that the two acts are to be construed as one,) that the latter clause expresses the last will of Congress. If the two acts are to be read as one, they cannot represent *two* acts of the Congressional will—one act of will must have given birth to both.

Nor is there any rational ground for his assumption that this supposed enlargement was annexed as a condition to the additional grants. The purpose and object of this legislation remained unchanged: nothing had intervened which made such an enlargement a necessary precaution against failure on the part of these companies. On the contrary, the chances of such failure were being diminished more than one-half by the passage of the amendatory act. By it double the previous means for the construction of the road was being placed in the hands of these companies, and the chances of failure were being lessened at least in the proportion in which their means were being increased. So the argument, instead of proving a necessity for the reservation of an enlarged power, proves the opposite. It seems clear, therefore, that the intent of Congress was merely to extend to the new and amendatory act the same power of alteration, amendment, and repeal which it possessed in respect to the orignal act. This conclusion is not only consistent

with proper rules of construction, but it is also in harmony with the exigencies of the case.

If, as I have attempted to show, the Thurman act impairs the obligation of the contract between the United States and the appellant corporation; if Congress has no power to enact a law, not passed as necessary and proper in the exercise of its express powers, which impairs the obligation of contracts, and if the foregoing interpretation of the powers reserved in the Pacific Railroad acts be correct, no further argument is required on the part of appellants. But if the foregoing interpretation be incorrect; if this reserved power, in terms, be without limit, it becomes necessary to proceed and inquire whether it be not limited by the constitution and the fundamental principles of all free governments.

As to the origin, nature, and validity of this power.

Under the English constitution the power of creating corporations is vested in the Crown. By letters-patent the King creates them, and as such letters issue "of his special grace, certain knowledge, and mere motion," he may annex such restrictions and conditions, *consistent with the constitution and laws of England*, as he may think proper; but they must all be contained in the charter, for the charter having been issued according to the laws of England, the King loses all control over it. Such conditions cannot be repugnant to the laws of England, for if they be the charter is void. Thus he cannot reserve the right to remove members without cause or legal process, because it is a maxim of English law that no man ought to answer for his freehold, franchises, or other thing without original writ *secundum legem terræ;* nor can he reserve the right to remove all the members of the corporation, with or without cause, for that would render the charter void—it being in the option of the King to create franchises, the law always considers them, when created, as raised for the benefit of the public, and annexes to them

such a degree of permanency as will best subserve the public interest. The corporation being created, the rights, liberties, immunities, privileges, and franchises vested in it become estates, and cannot in any respect be disturbed or taken away except by due process of law. (The King *vs.* Amery, 2 Durnford & East, 515: The King *vs.* Pasmore, 3 Durnford & East, 179.)

Even the King of England cannot violate the constitution and laws of England, nor can he acquire power to violate them under the pretext of a condition to a charter. Whatever the constitution and laws of England allow him to do he may reserve the power to do, but beyond this he cannot go.

But the theory of the English Constitution is that Parliament is omnipotent, and, hence, it has been held in England that the charter of a corporation may be repealed, or, in other words, that the corporation may be dissolved by an act of Parliament without the intervention of the courts. Yet the exercise of this power, so arbitrary and so repugnant to everybody's sense of natural right, has only twice found a place in English history: One being the suppression of the Order of Templars in the time of Edward II, and the other being the suppression of the Religious Houses in the time of Henry VIII. When in 1783 it was proposed, by act of Parliament, to remodel the charter of the East India Company, the measure was strenuously opposed by Mr. Pitt and Lord Thurlow. The latter denounced the measure as being not only a violation of the charter of the company, but a violation of the constitution of England. He characterized it as "an atrocious violation of private property, *which cut every Englishman to the bone.*" (Angell and Ames on Corporations, sec. 767.)

Would Lord Thurlow have thought it a less atrocious violation of private property had it been provided for by an act of Parliament older than the charter of the company, or in the charter itself? Would the bill in that case have

been, in his judgment, less subversive of the fundamental law of England? Would the character of the bill have been intrinsically changed, had it been previously provided, by an act of Parliament, that this atrocious violation of private property might be perpetrated? It is believed that no previous act of Parliament to that effect would have lessened, in his judgment, the atrocity of the bill, or rendered the proposed violation of private property less likely to "cut every Englishman to the bone." An act cannot be less atrocious because it is committed with malice aforethought. The idea that the atrocity of such a violation of private property is mitigated or wholly removed by a predetermination to commit it has been left to find development in American statesmanship, where the written law forbids what the unwritten law of England permits, but what, nevertheless, an Englishman's love of natural justice forbids him to tolerate.

A similar view of the nature of such a measure was taken in France, in 1786, in the discussion which arose on the new charter, then recently granted to the French East India Company. Those opposed to the charter denied the legal existence of the company, on the ground that the king had been surprised into making the grant; that the grant had not yet been perfected by the issuing of letters-patent, nor duly registered by the parliaments; and that it might, therefore, be lawfully suppressed, and ought to be, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy. On the part of the company it was contended that their grant was irrevocable; that it was but a renewal and confirmation of the charter of the old company, which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756, (but which suspension was, at the time, solemnly protested against by the parliament of Paris as illegal;) that their new grant might still be perfected by letters-patent, which the faith of the king was pledged to

issue; and that the privileges thus granted to them were irrevocably vested as a right of property, of which *they could not be deprived by any authority in the kingdom.* Such were the contentions upon both sides, but they both agreed, that if the charter had regularly issued according to the forms of the French law, it was *irrevocable*, unless forfeited by non-user or misuser, (4 Wheaton, 713—Note.)

Omnipotence is not included in the powers which are possessed by legislative bodies in America, unless this reserved power be among them. As remarked by Mr. Justice Miller, in the case of The Loan Association *vs.* Topeka, *supra*, "the theory of our Government, state and national, is opposed to the deposit of unlimited power anywhere." The power to destroy, or annul, the charter of a private corporation did not exist in Congress or legislatures, at least until this reserved power came into use. Prior to that time the only powers which they had over charters were such as, under the English constitution, were vested in the crown. As the king could grant charters, so could they. As he could annex to the grant, and include in the letters-patent such conditions—*consistent with the law of the land*—as he saw proper, so could they. But as he could not violate the constitution and laws of England or acquire the power to do so by a reservation, neither could they. As he could not by a reservation acquire the power to take private property or impair vested rights—a power which can be exercised only by due process of law—neither could they. As he could not, after having made the grant, alter it, or impose new conditions, neither could they. As he could not revoke the grant, or repossess himself of the franchises, except by judicial proceedings and for misuser or non-user, neither could they. That such was the case was first decided in 1806, in Wales *vs.* Stetson, (2 Mass., 146,) and again in 1819, by this Court, in the Dartmouth College case—the ground of the decision being that charters of private corporations are contracts, and cannot therefore be impaired by law.

In course of time this doctrine came to be considered as of mischievous tendency, as favoring the growth of monopoly. The mischief, however, if any, did not flow from the doctrine announced in that case, for that was just and consistent with the fundamental principles of American constitutional law. The threatened mischief had its source in the careless and improvident manner in which charters had been and were being granted. Instead of guarding against monopoly, and perhaps other evils, by inserting *in the charters* such restrictions and conditions as would have prevented the results complained of, legislatures were in the practice of granting franchises with few, if any, restrictions or conditions. They were not cautious or provident in making their contracts, and when they found that they had made a bad contract they began to grumble because they did not possess the power to remake it, or remodel it, so as to render it more favorable to the interests of the public. At last the brilliant idea occurred to them of inserting in the charter, or in a general law, or in the Constitution, an omnibus clause, reserving the power to alter, change, and annul such contracts at their pleasure. It does not seem to have occurred to them, nor does the discovery seem to have been since made, so far as I am advised, that in doing this they were not making a contract, but were reserving power to impair the obligation of contracts, to override the decision of this Court in the Dartmouth College case and the Constitution of the United States, to take away vested estates without due process of law. In doing this they arrogated to themselves the omnipotence of Parliament; they usurped a power hostile to the rights of private property and the fundamental principles of free government. The Constitution of the United States protects, or is supposed to protect, private property and private contracts from the aggressions of just such power as this. Constitutional guarantees are of little value if they can be set aside by legislative reservations of this character.

In relation to such reservations only two theories can be advanced—one being that they are constitutional reservations of legislative or judicial power, and the other that they become part of the charter—the contract—to which the corporators assent.

That they are reservations of legislative or judicial power does not, in my judgment, admit of rational dispute; but that they are constitutional reservations I deny.

That, as a legislative or judicial power, it is unconstitutional is of easy demonstration. The Constitution of the United States declares "that no laws shall be passed impairing the obligation of contracts;" "that no person shall be deprived of his property without due process of law." Under these reservations, Congress and legislatures declare "that no laws shall be passed impairing the obligation of contracts; *provided* that the charters of private corporations may be altered, amended, or repealed at any time." "That no person shall be deprived of his property without due process of law, except private corporations." That there is here an "irrepressible conflict" is obvious. The two declarations cannot stand together. If by such a proviso charters can be excepted out of the operation of these clauses of the Federal Constitution, why cannot all other contracts made by the United States or the States be excepted in like manner? And why may not all other contracts be taken out of the operation of these clauses in the same way; and these clauses, in that way, be virtually erased from the Constitution?

Suppose a law should be passed allowing mortgagors one year to redeem after foreclosure and sale, reserving power to shorten or extend the time. While such a law is in force A mortgages his property to B. The legislature, then, in the exercise of its reserved power, extends the time of redemption to three years. Would such legislation be binding upon B? Or suppose the time should be shortened to six months, would such legislation be binding upon A?

Any one taking the affirmative would argue thus: The existing law becomes a part of every contract. These parties made their contract knowing that the legislature might shorten or lengthen the time of redemption. They, therefore, assented that either might be done, and they are therefore respectively bound, as the case may be. Would this reasoning be satisfactory to the courts, or would they hold that the reservation was not legitimate legislation, that to hold it to be binding would be to hold that the legislature has power to impair the obligation of a contract, which is denied to it by the Federal Constitution and the fundamental principles of all free governments?

The case supposed is not imaginary. It actually occurred in the State of Minnesota, (*Goenen* vs. *Schroeder*, 8 Minn., 393.) The remarks of the court are so exactly adapted to my line of argument that I beg leave to quote them:

"Let us test the validity of this clause. The Legislature cannot impair the obligation of a contract. This is conceded. Nor can this branch of the Government, by any possible means, obtain this power. It is equally clear that a party adopts the law in force at the time he makes his contract. Now, suppose the Legislature passes a law which declares that all contracts entered into after its passage shall be subject to the power of the Legislature to make such changes in the obligations created by them as it may see fit, can it be seriously argued that future legislatures, by virtue of this act, can interfere with contracts subsequently executed, on the ground that the contracting parties adopted the provision and contracted in reference to it? If such is the case, constitutional guarantees are shorn of their efficacy and but delusions, leaving legislative bodies to be the sole judges of the extent of their powers. *Such position conflicts* with all our ideas of constitutional government. The right to contract is not derived from constitutional or legislative grant, but is inherent in the citizen. The regulation of this right, under constitutional restrictions, is vested in the Legislature. This right to contract necessarily involves the power in the contracting parties to stipulate absolutely and certainly to do, or not to do, any particular act properly the subject of convention. This right cannot be taken away, or

even impaired by any power in the Government, nor, when once exercised so as to impose obligations upon the parties, can those obligations be lessened, increased, or in any manner interfered with. The right to contract obligations, and the obligations assumed are of equal sanctity, and free from legislative control. * * * To deny parties the right to assume definite and certain obligations in their commercial dealings is a legislative encroachment fraught with evils that would strike at the very foundation of commerce and property. Far better that the Legislature should prohibit this species of contract altogether and leave men to other kinds of security. In this case it has simply declared that the obligation of every mortgage containing a power of sale executed after the passage of the act of 1858, shall be variable at the pleasure of the Legislature. The practical result of the enactment is that a mortgage executed while the law remains unchanged would allow a sale of the land with one year's redemption, and be a valuable security, and the same investment, with the period of redemption extended to three or six years, would or might be nearly valueless. *This is not legitimate legislation. It is an attempt to reserve to the Legislature powers which it does not otherwise possess.* * * * * *The clause is inoperative.*"

We have already seen that when the United States, or the States, make a contract they divest themselves of their sovereignty and become mere civil corporations with the same, and no greater, capacities which natural persons possess, and like them are subject to all the laws of contracts. (Davis *vs.* Gray, 16 Wall., 233; The Commonwealth *vs.* Proprietors of New Bedford Bridge Co., 2 Gray, 339.) Such being the case, the foregoing reasoning applies also to contracts to which they may be parties.

Again: The intrinsic nature of this reserved power is judicial. It assumes that under its operation contracts may be altered, private rights may be interfered with and private property taken away. Such acts are strictly judicial, and, therefore, the power to do them is not, under our form of government, vested in legislative bodies, and any attempt on their part to perform such acts, for cause or otherwise,

is a usurpation of power which is lodged in the judicial department of the Government.

The contract theory is equally untenable. Those who hold to this theory claim that such reservations are not rules of law, but contracts between the State on the one hand and the corporators on the other: that such a reservation becomes a part of every charter to which the corporators assent; and accordingly, when the State undertakes to alter, amend or repeal the charter, it is not acting as a law-maker but as a mere civil corporation, and that it is not exercising a power which it possesses as a sovereign, but a right which it has acquired by convention and possesses as a contracting party. Let us test the soundness of this reasoning. However plausible and ingenious it may seem on first impression, it will be found, I think, upon critical examination, that it proves too much and must, therefore, fall under its own weight.

Such a reservation is of strange countenance in the law of private contracts. We search the books in vain for an example of such a contract, or for the construction of such a provision. Nor is this surprising. Its presence in the law of contracts would make all contracts impossible.

One of the indispensable requisites of a bilateral contract is mutual obligation—it must bind both parties or it binds neither. The moment this reservation is inserted in such a contract this mutual obligation is destroyed. The contract is no longer binding upon both parties, for one of them may alter, change or annul it the next day. One of two results must follow, the contract is destroyed or the reservation is a nullity. Thus the argument turns back upon itself and reverses the conclusion which it was designed to support.

Suppose A should contract to convey to B his farm, blackacre, upon the latter's paying an agreed price therefor in two instalments. Suppose A should reserve power to alter or annul the contract. B having paid the first instalment, suppose A elects to exercise his reserved power and notifies

B that he annuls the contract. Would a court of equity, upon the tender of the remaining instalment by B refuse at his suit to decree specific performance? The supposed case is simply absurd, but it is no more absurd than the idea that a State, in a contract which it is making with one of its constituents, can insert a similar reservation and be allowed to exercise the power.

Another remarkable anomaly involved in this contract theory is that an act which, otherwise, would be unconstitutional, may be made constitutional by force and effect of a private contract. It concedes that a power contained in a State constitution, or in a statute, national or State, to impair a contract is unconstitutional, as being repugnant to the Federal Constitution, but insists that if the power be transferred to the contract it, *eo instanti*, becomes constitutional; or, in other words, that the Constitution of the United States is not a fixed and unchangeable rule for the determination of private rights, duties, and obligations, but that its provisions may be altered, or even entirely set aside, by a convention to that effect between private parties, for, as we have seen, both the United States and the States sink to the level of a private citizen when they enter the field of trade and commerce.

This contract theory develops still another anomaly. It recognizes a capacity in the citizen to trade away his right to appeal to the Federal Constitution for that protection which it affords to his property and contracts against legislative aggressions. The right to so appeal is inalienable. It is a right which the public, as well as the individual, is interested in maintaining. The opposite doctrine is hostile to the idea of free government, and subversive of its ends and objects.

Trial by jury is not more inestimable than the inviolability of contracts. Suppose that a State should insert a proviso in the charter of a private corporation that all disputes arising in the business of the corporation, or affecting

its rights of property, should be submitted to arbitration, or to the decision of a judge acting without a jury, is any one prepared to assert that such a proviso, though expressly assented to by the corporation, would be binding upon it, and that when brought into a Federal court for any cause it would be thereby precluded from demanding a jury, notwithstanding the Constitution of the United States declares that "in suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved?"

Suppose a State should pass a law to the effect that no private corporation of another State should be permitted to transact business in the State unless it first appoints an attorney in the State, on whom process of law can be served, and agrees that it will not remove any action that may be brought against it in the courts of the State into the Federal courts for trial; and suppose a corporation of another State should accept this condition, and appoint an attorney, and agree not to remove any action brought against it in the courts of the State to the Federal courts for trial, would such a statute or agreement be binding upon the corporation and prevent it, when sued in the State courts, from appealing to the Federal Constitution and the laws made in pursuance thereof, and demanding that the action be transferred, as therein provided, to the Federal courts for trial?

This question has been recently answered, *in the negative*, by this Court.

In 1870 the Legislature of the State of Wisconsin passed a statute to the following effect:

"It shall not be lawful for any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, or foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such com-

pany desiring to transact any such business, as aforesaid, by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law may be served, containing *an agreement that such company will not remove the suit for trial into the United States circuit court or Federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another be substituted.*"

This statute being in force, the Home Insurance Company, a corporation formed under the laws of the State of New York, being desirous of engaging in business in the State of Wisconsin, established an agency there, and in compliance with the provisions of said statute filed in the office of the Secretary of State of Wisconsin an appointment of H. S. Durand as their agent in it, on whom process might be served. This power of attorney contained the following clause:

"And said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States circuit or Federal courts."

Being thus established in the State, the company issued a policy of insurance, and a loss having occurred under it, an action thereon was brought against the company in one of the State courts. The company entered an appearance and moved that the action be transferred for trial to the circuit court of the United States, pursuant to the provisions of the twelfth section of the Federal Judiciary act of 1789. The section under which the company demanded the removal is as follows:

"If a suit be commenced in any State court * * * by a citizen of the State in which the suit is brought, against a citizen of another State, * * * and the defendant shall at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending * * * and offer good and sufficient surety for his entering in such court, on the first day of its session,

copies of said process against him, and also for his there appearing * * * it shall then be the duty of the State court to accept the surety and proceed no further in the cause."

The court denied the motion for a removal. The case was tried and a judgment against the defendant was rendered. The company appealed to the supreme court of the State, which affirmed the judgment, holding that the statute of the State, and the agreement of the company under it, were not repugnant to that clause of the Constitution of the United States, which declares "that the Constitution of the United States, and the laws made by Congress in pursuance thereof, shall be the supreme law of the land," and hence they were, therefore, binding upon the company. Not satisfied with this solution of the question, the company brought the case to this court. This court, in an elaborate and well considered opinion, delivered by Mr. Justice Hunt, reversed the judgment of the supreme court of Wisconsin, holding that the statute and agreement in question were repugnant to that clause of the Federal Constitution which declares the Constitution of the United States, and the laws made in pursuance thereof, the supreme law of the land. The points decided were:

"1st. The Constitution of the United States secures to citizens of another State than that in which the suit is brought an *absolute* right to remove their cases into the Federal courts, upon compliance with the terms of the act of 1789.

"2d. The statute of Wisconsin is an *obstruction* to this right, is repugnant to the Constitution of the United States, and the laws in pursuance thereof, and is illegal and void.

"3d. The agreement of the insurance company *derives no support from an unconstitutional statute*, and is as void as it would be *had no such statute been passed.*"

Insurance Company *v.* Morse, 20 Wallace, 445.

The question involved in that case differs from the question under consideration in circumstance, but not in princi-

ple. The solution of each turns upon the power of a State to set aside the Federal Constitution by force of a convention between itself and a citizen, which it erroneously calls a contract. If we look to the comparative merits of the two questions, the question under discussion must be conceded to be of vastly the most importance. Whether a citizen is entitled, under the Federal Constitution, to have his contracts, or his rights and liabilities under them, litigated and determined in the Federal courts instead of the State courts, is a question of minor importance to the question whether he shall be allowed at all, in either forum, to invoke the protection of the Federal Constitution against a violation of his rights under it. The former merely involves a choice of forums, the other involves a principle—the right to appeal at all, in any forum, to the protection which the Federal Constitution professes to afford him in a matter of vital importance.

If, as the court holds, the statute of Wisconsin was unconstitutional because it obstructed the defendant in the exercise of a right secured to him by the Federal Constitution, by parity of reason an act of Congress or the constitution of a State which contains the clause "to alter or repeal," is also unconstitutional, because it obstructs private corporations in the enjoyment of a still greater right secured to them by the Federal Constitution.

If, as the court holds, the agreement of the defendant derived no support from the unconstitutional statute of Wisconsin, by parity of reason, the agreement in question of private corporations derives no support from an unconstitutional act of Congress or an unconstitutional provision in a State constitution; for, as all admit, acts of Congress, State constitutions, and State statutes stand upon a common level in the presence of the Federal Constitution.

If there were no other grounds upon which to combat this contract theory, it should be held untenable upon grounds of public policy alone. In Fletcher *vs.* Peck, (6 Cranch,

135,) Chief Justice Marshall said: "It may be doubted whether the *nature* of society and of government does not prescribe some limits to legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honorably acquired, may be seized without compensation?" It is familiar law that a contract or promise to do an act which is forbidden by law, or to omit to do an act enjoined by law is illegal and will not support an action. In this case the Federal Constitution declares that the obligation of contracts shall not be impaired. The declaration is founded upon that broad public policy which underlies all laws, be they constitutions or statutes; a policy which all constitutions and all laws are made to administer. Public policy requires that contracts shall be inviolable. Without implicit faith in the inviolability of contracts the world cannot move. This policy finds expression in the Federal Constitution; but notwithstanding, it is attempted to be defeated by a State constitution, or a national or State law, or by a contract between the United States or a State and a large class of citizens existing in the form of corporate bodies. It is agreed that the United States or a State may do precisely what the Federal Constitution forbids. That such an agreement defeats, so far, the policy which dictated the prohibition, is manifest; and that it ought for that reason to be declared illegal and void is equally manifest.

In view of what has been said it seems clear that such reservations, in either of their phases, are repugnant to the Constitution and the principles of free governments, and are strangers to the law and nature of contracts.

To avoid misapprehension I desire to say, in conclusion, upon this branch of my argument, that I do not deny the power of legislative bodies to annex conditions to any and all franchises which they may elect to grant, but I claim that they can only annex such as are specifically enumerated in the grant, and then only such as are *consistent with the law*

of the land. They cannot annex a condition that they shall be allowed to enact laws which will impair the obligation of the contract, for such a condition is *inconsistent with the law of the land.* They cannot annex conditions, not enumerated, under a general clause which is broad enough, in terms, to include conditions *not consistent with the law of the land.* They cannot annex a condition, either by express provision or under a general clause, to the effect that they may take away, by legislative enactment, the property or franchises of the corporation, with or without cause, for such a condition *is inconsistent with the law of the land.* They cannot annex conditions to the effect that they may act, in respect to the property and rights of corporations, in a manner in which they are not authorized to act by the law of the land in respect to the property and rights of natural persons. The law of the land protects and holds sacred the property and rights of artificial persons as well as the property and rights of natural persons. The Constitution is no respecter of persons.

This does not prevent them from annexing all the conditions which a due regard to the public interests may require; and if they do not do so, the fault is not *in the law*, but *in the contract;* but they must make their contracts as other contracts are made; all acts which are to be done, or not done, must be enumerated in the contract, and acts not so enumerated will be conclusively presumed not to have been intended. There cannot be one rule of evidence for contracts between individuals and another where the State is a party. There can be no mental reservations in the one case or in the other, and having made the contract, they must stand by it with the same fidelity which the law requires at the hands of all other contracting parties.

So far as the reports of the courts show there seems to have been no challenge interposed by the bar to these reservations on the score of validity. Had such a challenge been interposed, I think the courts would have sustained it; but

as it is, they have continued to treat them as having validity to a greater or less extent. Some courts have accorded to them all the power which their language imports; others have undertaken to put a limit upon the powers which may be exercised under them, but as yet the limit is vague and uncertain. If they be restrained to acts which are consistent with the law of the land they will do no harm, except as causes of judicial perplexity; but otherwise they will be divested of all significance, as they ought to be.

In the language in which these limitations are expressed there is no limit defined or implied, and the fact that it has been found necessary to impose limitations illustrates the true character of this reserved power—it is in conflict with the fundamental principles of the constitution and free government everywhere.

The foregoing remarks have not been made in much hope that the courts will retrace their steps and carry the rule in the Dartmouth College case to its logical conclusions. Perhaps this pernicious provision has become too deeply imbedded in the jurisprudence of the country to be now eradicated. My chief purpose has been to call attention to the true nature of these reservations and their capacity for mischief, in the hope that the growing tendency of legislative bodies to extend the field of their operations under them may be checked, and that the powers asserted under them may be confined to such measures *as are consistent with the law of the land.*

As to the present status of this power.

The present status of this power cannot be more clearly exhibited than by incorporating in this argument a few extracts from the opinions of some of the judges who have had occasion to deal with it. In the case of the Commonwealth *vs.* Essex Co. (13 Gray, 253) Chief Justice Shaw said:

"Does this come within the power of the legislature to amend or alter? It seems to us that this power *must have*

some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business, and they purchase such lot from a third person, could the legislature prohibit the company from holding it? If so, in whom would it vest; or could the legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

"Suppose a manufacturing company, incorporated, is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow owners future annual damages? Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this: that where, under power in a charter, *rights have been acquired and become vested*, no amendment or alteration of the charter can take away the property or rights which become vested under a legitimate exercise of the powers granted."

In *Tomlinson* vs. *Jessup* (15 Wall., 454) Mr. Justice Field said:

"The object of the reservation and of similar reservations in other charters is to prevent a *grant* of CORPORATE RIGHTS AND PRIVILEGES in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation. * * *

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its *charter* directly from the State."

In the case of *Miller* vs. *The State*, (15 Wall., 478,) Mr. Justice Clifford said:

"Power to legislate, founded upon such a reservation in a charter to a private corporation, *is certainly not without limit*, and it may well be admitted that it cannot be exercised *to*

take away or destroy rights acquired by such a charter, and which, by a legitimate use of the powers granted, have become *vested* in the corporation; but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs so as to protect the rights of stockholders and of creditors, and for the proper disposition of the assets.

"Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract."

In the case of *Sage* vs. *Dillard*, (15 B. Monroe, 357,) it was held that such a reservation does not imply the power to alter or change the *vested* rights acquired by the corporators, under the charter, and to add new parties and managers without the consent of the corporators.

In the case of the *Holyoke Company* vs. *Lyman*, (15 Wall., 500,) Mr. Justice Clifford again said:

"The provision * * * declaring that acts of incorporation shall be subject to amendment, alteration or repeal at the pleasure of the legislature, reserves to the legislature the authority to make any alteration or amendment of a *charter* granted subject to it, which will not defeat or substantially impair the object of the grant, or *any rights vested under it*, and which the legislature may deem necessary to secure either that object or other *public* or *private* rights."

From the foregoing review of the legislative and judicial history of this reserved power, it is only necessary, for the purposes of this argument, to draw two conclusions:

First, that until the passage of the Thurman act there has never been any attempt made, either by legislative or judicial bodies, to apply this power to any contracts except such as constitute the charters of private corporations; and—

Second, that in the case of charters it has been uniformly held that this power cannot be so used as to impair *vested rights.*

Passing the former for the present, and assuming, for the purposes of the argument, that this contract constitutes a part of the charter of the appellant corporation, and that it is not an independent and separate agreement, let us inquire whether the rights of the appellant corporation, under such contract are *vested* within the meaning of the foregoing judicial opinions.

As already suggested, it is not easy, in view of the conflicting decisions of the courts, to determine, in all cases, what rights are so vested that they cannot be disturbed or changed by legislative action. But while no general rule can be laid down, it is not difficult to determine, by the light of adjudged cases, which have come to be considered as well established, in many instances, whether a given right is so far vested as to be beyond the reach of legislative interference. Referring to such cases, it will be found that the right of the appellant corporation to the full time allowed by the contract, for the payment of this loan, is a *vested right* of which it cannot be deprived by Congressional action. The following are instances of rights vested within the meaning of this rule:

A right of entry once vested cannot be divested by the legislature—for example, a right of entry for forfeiture which has vested in heirs, cannot be transferred to devisees by a change in the law as to wills. (*Southard* vs. *Central R. R. Co.*, 2 Dutcher, 13.)

And where a legacy was given to an unincorporated society, and was therefore void, and the right of the next of kin had become fixed, it was held that the legislature could not provide that the society, upon being incorporated, should take the legacy. (*State* vs. *Warren*, 28 Md., 328.)

And the right of a married woman to dower, which vests

on the death of her husband, cannot be taken from her by subsequent legislation. (*Lucas* vs. *Sawyer*, 17 Iowa, 517; *Burke* vs. *Barron*, 8 Clarke, Ind., 132.)

The husband's right to reduce his wife's choses in action to possession, when vested, cannot be taken away by a subsequent statute, even where the chose in action is a contingent remainder in personal property, and the contingency does not happen until after the passage of the statute. (Dunn's Adm'rs vs. Sargent, 101 Mass., 336.)

A bounty cannot be diminished so as to affect those who have already earned it under the terms of the original act. (*People* vs. *State Auditors*, 9 Mich., 327.)

A statute prohibiting payment to an officer of compensation for service already performed is void. (State vs. Auditor, 33 Mo., 287.)

And where the holder of county scrip had presented the same for payment, there being money in the treasury applicable to his claim, it was held that his rights could not be taken away by subsequent legislation. (La Forge vs. Magee, 6 Cal., 650.)

The right of action against a town of settlement for supplies furnished to a pauper, cannot be taken away by a change in the settlement laws. (Pembroke vs. Epsom, 44 N. H., 113.)

The right to plead the statute of limitations, when it has become complete, cannot be taken away. (Dillon vs. Dougherty, 2 Grant's cases, 99; Girdnie vs. Stephens, 1 Heisk, 280.)

And where it has been provided by statute that the payment of usurious interest shall operate as a payment on the principal, no change in the law can revive so much of the principal as has been thus extinguished. (Hunter vs. Hatch, 45 Ill., 178.)

A mechanic's lien, if not fully perfected, will fall with the repeal of the statute creating it. (Bailey vs. Mason, 4 Minn., 546; Dunwell vs. Bidwell, 8 Minn., 34;) but if it

has been fully perfected it will not. (Streubel vs. Milwaukee, &c., R. R. Co., 12 Wis., 67; Gazell vs. Lake, 1 Oregon, 119.)

☞ But a repeal cannot take away vested rights; for example, when the State had by statute postponed its lien on a railroad to enable the corporation to negotiate its bonds, it cannot by a repeal affect the priority of such bonds. (Sinking Fund Comm'rs vs. Northern Bank, 1 Metc., Ky., 174.)

The repeal of a granting act cannot take away titles vested under it, (*Rice* vs. *Railroad Co.*, 1 Black, 358.)

A right to payment of money vested by transactions under a statute cannot be taken away by a repeal of the statute, (Streubel *vs.* Milwaukee, &c., R. R. Co., *supra.*)

Nor the right to pilotage vested by a tender of service, (Steamship Co. *vs.* Jaliffe, 2 Wall., 450.)

A right of action cannot be created between parties where there was none before, (Rogers *vs.* Leftwich, 2 Heisk, 480;) nor can a lien be created where there was no privity, (Jacobs *vs.* Knapp, 50 N. H., 71; *aliter* as to future contracts, Blauvelt *vs.* Woodworth, 31 N. Y., 285; nor can the amount of damages recoverable for injuries, where the right thereto has already accrued, be limited by subsequent legislation, (Key *vs.* Penn. R. R. Co., 65 Penn. St., 269.)

To these may be added other familiar illustrations. An estate in land is a vested right; a legacy to a minor, payable on his reaching the age of twenty-one years, is a vested right, and if he dies before that time it will not lapse, but it will go to his representatives; any right which can be enforced in a court of justice is a vested right; a defense to an action which can be maintained in a court of justice is a vested right.

The foregoing decisions render the question before the Court of easy solution.

The undertaking on the part of the appellant corporation was to repay this loan at the expiration of thirty years, and

not before. That has been decided by this Court, (United States *vs.* Union Pacific R. R. Co., 91 U. S. R., 78.) It had, *then*, until the passage of the Thurman act, a perfect defense to any action that could be brought on this undertaking by the United States before that date. That defense cannot be taken away: yet that is precisely what has been attempted in the Thurman act. That act creates a right of action where none existed before. It provides that a large sum of money shall become due and payable annually on the first day of February in each year, and if it is not so paid a right of action therefor, according to the Thurman act, will accrue to the United States, and the time allowed under the original contract for payment will, according to that act, be no defense against such right of action. It therefore both creates a right of action and takes away a perfect defense.

That the appellant corporation, upon the completion and acceptance by the President of each section of twenty miles of road, acquired a vested right to a patent for the odd sections on each side and within twenty miles of the road, of which it could not be divested without its consent, cannot be disputed in view of the foregoing decisions. If such right was not a vested right, then are vested rights a delusion. The same is true in respect to the subsidy bonds. Upon the completion and acceptance of each section of twenty miles, the appellant corporation acquired a vested right to sixteen, thirty-two, or forty-eight of said bonds, according to the location of the section, of which it could not be deprived. For these patents and these bonds, it had a perfect right of action which it could have enforced in a court of justice (excluding from consideration the sovereignty of the United States which does not affect the right, but its enforcement only.) When the patents and bonds were delivered, the appellant corporation acquired a vested estate in the lands and in the bonds which the United States cannot take away. It not only acquired a vested estate in the bonds, but it acquired a vested estate in all the incidents of the bonds—the

rate of interest and time of payment of interest and principal—the right to pay back the amount in the same bonds or other bonds, treasury notes, or other evidences of debt against the United States, of which it could not be divested. That this estate extended to and included these incidents may be thus illustrated: Suppose that the United States, instead of granting the land, had agreed to lease it for thirty years. The lease having been made, the right of the appellant corporation to the leasehold estate would have become as vested as the fee in the land is now, and could no more be taken away than the latter estate. In relation to the bonds the supposed case is the real case, *mutatis mutandis*. The United States did not give the bonds; they loaned or *leased* them for thirty years; they did not give the money, but the use of it for a limited period. This use, in legal complexion, is the equivalent of a lease of the land, or the use of the land. The former is as much property as the latter. Property is not mere ownership or possession; it includes the right to use. Without the right to use, all property is valueless—use, rather than title or possession, is, therefore, property—it is the only valuable quality which property possesses, and whoever destroys the use of a thing destroys the thing itself.

"*Property is the right of any person to possess, use, enjoy, and dispose of a thing.* The term, though frequently applied to the thing itself in strictness means only the rights of the owner in relation to it. A man may be deprived of his property in a chattel, therefore, without its being seized, or physically destroyed, or taken from his possession. Whatever subverts his rights in regard to it *annihilates his property it it.*"

Wyneheimer *vs.* The People, 13 N. Y., 378.

By the delivery of these bonds, the appellant corporation acquired a vested estate in the use of the money which they represent. This estate will not terminate until the expira-

ration of thirty years from their date, and this estate clearly falls within the limitations imposed by this court upon the exercise of this reserved power. Like all other property it is protected by those clauses of the Constitution which declare that private property shall not be taken for public use without just compensation, and that it shall not be taken for any other use except by due process of law. Unless this be so these constitutional restrictions will become ropes of sand in the hands of legislative bodies in many cases. This reserved power must be confined, under the most liberal construction which can be given to it under the Constitution, to the exercise of an administrative control in the interest of the public over corporate franchises. If it be allowed a wider scope it will become destructive to the Constitution itself—its further extension will be equivalent to a judicial declaration that legislative bodies may, by a reservation of this character, acquire a power higher than the Constitution.

But the most satisfactory demonstration of the invalidity of this act is found in the fact that the contract which it seeks to rewrite is entirely outside of, and collateral to, the charter of the appellant corporation. At another place in this brief, this fact has been clearly shown. It has also been shown, that until now no legislative or judicial attempt has ever been made to apply this reservation to the ordinary business contracts of the States or of the United States. In State constitutions and laws this reservation is in terms confined to charters. It is not to be presumed that Congress intended by this reservation to acquire any greater power in relation to these companies than such as the States had been in the practice of reserving in respect to corporations organized under their laws. On the contrary, the limitations imposed upon the reservation, in the 18th section of the act of 1862, show conclusively that this power was to be confined to the objects and purposes for which it had been, and was being, reserved by the States. It was

reserved to secure the construction of the road and keeping it in working order, which involved merely an administrative control over the *franchises* of these companies. But if this reservation was intended to cover not only franchises, but all collateral contracts, then we say, that as to such contracts, it is utterly void.

First, because it is an attempt on the part of Congress to acquire by reservation a power which is not only not granted, but is denied, by the spirit of the Constitution. Such a doctrine would give to Congress despotic power over all persons having any business relations with the United States; a power hostile to American ideas of government. Second, because, as we have seen, when the United States, or the States, make contracts they divest themselves of their sovereignty and stand upon the level of private citizens. (Davis *vs.* Gray, 16 Wall., 233.) In the law of contracts between private persons we look in vain for such a reservation. In such law it has and can have no existence. It is at war, as has been already shown, with the definition of a contract. Mutuality of obligation is an indispensable requisite of bilateral contracts between private parties. This mutuality would be destroyed by the insertion of such a reservation; and, if inserted, the courts would declare it repugnant and void in the case of an executed, or partially executed, contract, and in the case of an entirely executory contract they would declare the clause, or the whole contract, void for want of mutuality. Where one person reserves the right to alter or amend the contract at his pleasure there can be no mutual obligation. (See dissenting opinion of Mr. Justice Bradley, concurred in by Mr. Justice Field, in Miller *vs.* The State, *supra.*)

V.

The validity of this act cannot be sustained by reference to the law of mortgages.

There were among the friends of this measure, in the Senate of the United States, some who claimed that the powers of Congress, in the premises, were co-extensive with the powers of a court of equity in mortgage cases; and that the measures adopted in this act are such as a court of equity would adopt under the same circumstances. This point was so clearly and forcibly answered by the Senator from Georgia, (Mr. Hill,) that I shall content myself, upon this point, with quoting what he said. He spoke as follows:

"Those who support this bill upon a theory of trust—and I invite the lawyers in this body to hear this argument—are, I must say, in my judgment, easily answered. In the first place, if the power claimed exists at all, it is clearly a judicial and not a legislative power. But the position to justify this bill could not be sustained under the facts of this case, as far as they have been presented to the Senate, even in a court of equity. The rule upon this subject is familiar to lawyers, and has been decided in a great number of cases. To authorize courts to interfere in the manner proposed by this bill, three facts must clearly appear: first, that the *corpus* of the property mortgaged is insufficient to pay the debt; second, that the mortgagor is insolvent; and, third, that the mortgageor is in default. Now, mark me, I do not say that the only default is non-payment at the maturity. Any act of the debtor which is wrong and which threatens to destroy the *corpus* covered by the lien of the mortgage is a default. Without the last fact, the first two will not be considered. It matters not that the mortgagor is insolvent; it matters not that the property which the creditor selected to secure his debt is insufficient to pay it; those were circumstances he ought to have looked to before he made the contract. Superadded to these two conditions there must be default, some wrongful act or failure to act by the debtor. There can be no remedy where there is no

wrong, and there can be no wrong where there is no default, and courts have no right to anticipate and much less to redress a fault which has not occurred. This rule is strongly stated by Mr. Thomas in his work on mortgages, in the following language:

"The right of entry by the mortgagee having been abolished, the mortgagor is, both at law and in equity, entitled to the complete enjoyment of the mortgaged premises and of their rents and profits until the debt is due, unless such rents are expressly pledged for the payment of the debt. If no proceedings are taken for the appointment of a receiver, his right to the rents continues until it has been divested by a foreclosure sale, and until the purchaser has become entitled to possession under the sheriff's deed. Where, however, the security is insufficient and the mortgagor or other person who is personally liable for the payment of the debt is insolvent, the mortgagee may apply for a receiver of the rents and profits of the mortgaged premises which have not yet been collected, and this relief will be granted, unless the person in possession shall give security to account for such rents in case there shall be a deficiency.

* * * * * *

"The right to this relief does not result from the relations of the parties, but from equitable considerations alone. It is not a matter of strict right, and each application is addressed to the sound discretion of the court.—*Thomas on Mortgages*, pages 301 and 302.

"In support of this authority and this rule Mr. Thomas refers to a large number of cases, every one of which I have examined, and every one of them was a case of foreclosure after default in payment; and I challenge any gentleman to produce a book where a case has ever been decided in which the court took jurisdiction to require additional security, or to take the rents, issues, and profits from the mortgagor before default, however insufficient the property might become in the natural course of events, or however insolvent the mortgagor might become. Insolvency in law may be a misfortune: it is not a fault that furnishes a remedy, unless it be accompanied by actual waste and wrong to the creditor. The rule is thus stated in the case of the Syracuse City Bank *vs.* Tallman and others, in 31 Barbour, and it is well stated in this decision:

"Unless there be a special clause to that effect, in a mortgage, the mortgagee has no lien upon the rents and profits; and as a general rule the mortgagor, until the sale, is entitled to remain in possession.

"But courts of equity, under certain circumstances, will, *after default* in an action for foreclosure and sale, anticipate the final judgment by the appointment of a receiver, and in effect put the mortgagee in possession and allow him to divert the rents and profits of the mortgaged premises from the hands of the mortgagor, and hold them as additional security for the payment of the mortgage.

"To entitle him to this relief it must appear that the mortgaged premises are an inadequate security for the debt, and that the mortgagor, or other person liable for the mortgage debt, is insolvent.

"This relief does not grow directly out of the relations of the parties or the stipulations contained in the mortgage, but out of equitable considerations alone. It is not a matter of strict right, but is addressed to the sound discretion of the court.

"*It seems* that when the mortgagor is insolvent, and fails to pay at the day appointed, and the mortgaged premises are an inadequate security, as between the mortgagor and mortgagee, it is within the equitable discretion of the court to allow the latter to intercept the rents and profits, for his better protection from loss. And that this is the utmost extent to which the relief has been granted, or to which it can be granted, within any admitted principle of equity.—*The Syracuse City Bank* vs. *Tallman and others*, 31 *Barbour's Supreme Court Reports*, 201.

"This judge says the farthest the rule has ever gone is, that after a default and before judgment of foreclosure, a court of equity will appoint a receiver and divert the rents and profits to the payment of the debt until the judgment of foreclosure and sale under it, if the premises are insufficient to pay the debt, if the mortgagor is insolvent, and if the mortgagor is in default; and I challenge any lawyer on this floor to present a case on record to the contrary where any proceeding was taken in law or equity to divert rents, issues, and profits or earnings, which are not expressly included in the lien, from the mortgagor to the mortgagee until after default by the mortgagor. Whether I am justified in quoting legal rules to a body of men who claim to be bound by no law is a question I will consider directly."

So far as this act can be considered as an attempt to exercise jurisdiction in equity, (which in one view it undoubtedly is,) it goes beyond the power of Congress. Except in respect to impeachments, the election, returns, qualifications, behavior, punishment, and expulsion of members, Congress has been granted no judicial power.

VI.

The validity of this act cannot be sustained by reference to the power of visitation.

There were in the Senate of the United States, among the friends of this measure, those who claimed, that in respect to these corporations, the power of visitation was vested in the United States, and that this act was an appropriate exercise of that power. It is astonishing how much eminent lawyers can forget when they abandon their profession and enter the political arena.

The fallacy of this position, as well as the *forgetfulness* of those who took it, was exposed by the Senator from Ohio, (Mr. Matthews.) He spoke as follows:

"What are the excuses put forth? On what pretenses found in any system of jurisprudence is this thing based? My friend, the Senator from Vermont, said yesterday afternoon that it was sufficient to found it on the right of visitation, and I understood him to express a little sort of impatience, not to designate it by any other name, at the Senator from Massachusetts for not knowing enough of the horn-books of the law to know that that was a plain and perspicuous ground upon which it could be based. Now, I read from a horn-book of the law, the second volume of the Commentaries of Chancellor Kent, on the subject of the visitation of corporations, wherein he says:

"I proceed next to consider the power and discipline of visitations to which corporations are subject. It is a power applicable *only* to *ecclesiastical* and *eleemosynary* corporations; and it is understood that no other corporations go under the name of eleemosynary but colleges, schools, and hospitals. The visitation of civil corporations is by the Government itself, *through the medium of the courts of justice.*

Again:

"This visitorial power arises from the property which the founder assigned to support the charity; and as he is the author of the charity, the laws give him and his heirs a visitorial power; that is, an authority to inspect the actions and regulate the behavior of the members that partake of the charity. *This power is judicial and supreme, but not legislative.*

Again:

"There is a marked and very essential difference between *civil* and *elec-*

mosynary corporations on this point of visitation. The power of visitors strictly speaking, *extends only to the latter.*

Again:

The visitorial power, therefore, with us, applies *only* to eleemosynary corporations. Civil corporations, whether public, as the corporations of towns and cities, or private, as bank, insurance, manufacturing, and other companies of the like nature, are not subject to this species of visitation. *They are subject to the general law of the land and amenable to the judicial tribunals for the exercise and the abuse of their powers.* The way in which the courts exercise common-law jurisdiction over all civil corporations, whether public or private, is by writ of mandamus and by information in the nature of *quo warranto.* It is also well understood that the court of chancery has a jurisdiction over charitable corporations for breaches of trust.—2 *Kent's Commentaries*, 363, 364, 397.

"Now, three things appear: first, that the power of visitation applies only to *corporations;* secondly, it applies only to *eleemosynary* corporations, and not to *civil* corporations: and thirdly, that the power of visitation is not *legislative* but *judicial.*"

Here I close my argument. If only a moiety of what I have said be true, it is sufficient to show that this Thurman act is the most extraordinary legislation that has ever found its way into the statutes of a free people. In every provision we find a direct attack upon private property and private rights, which ought to cut every American to the bone. That its passage has not created a wide-spread indignation is due to the fact that it is aimed only at two corporations which, for cause or without cause, seem to be under the frowns of legislative displeasure. Were it general in its effect: had it been aimed at all classes of corporations and natural persons, its enactment would have shaken the body politic from centre to circumference. It would have been long since denounced, in the energetic language of Lord Thurlow, "as an atrocious violation of private right;" but, either wisely or unwisely, human nature is so constituted that we look complacently upon the wrongs of others, and not until they become our own are we able to realize their atrocious character. Among all the acts which contributed to make the fourth of July, 1776, memorable in the annals of this Republic, we search in vain for a deed of greater

enormity, or one more destructive to freedom. Wrongs of less magnitude have covered the surface of the earth with battle-fields and enriched its soil with human blood. It is a direct assault upon rights which have been held sacred in all ages and among all peoples. It is a gross violation of national faith, which would have done no discredit to the genius of faithless and perfidious Carthage. It violates that which, in all well-regulated governments, is held to be inviolable. Under the shallow pretext of guarding the public Treasury against possible loss in the remote future, without due process of law, it seizes private property and transfers it to the coffers of the Nation. It seizes, without process and against the consent of the owners, the rents, issues, and profits of property upon which the United States have no lien. It imposes a lien upon property, contrary to the law of the land, and against the dissent and protest of the owner. It creates a right of action where none existed before, and takes away a perfect defense already existing. It declares supposed breaches of contract to be crimes, and punishes them with fines and imprisonments. Without the consent of the parties it imposes new penalties and forfeitures not provided for in the original contract. Without the consent of the debtor it makes a debt payable in annual instalments twenty years before any of it is due. It makes a debt payable in "the bonds, Treasury notes, and other evidences of debt against the United States," payable in money only, without the consent of the debtor. And, lastly, it sets aside, as to these appellants, the settled and established modes of practice and procedure in the courts of justice, and substitutes in their place new and untried methods not in harmony with existing usages and customs, and not applicable to other corporations or to natural persons.

This long catalogue of invaded rights, resulting not from any perturbations of the popular mind, but coming from the calm and deliberate purpose of the chosen representa-

tives of the people, warn us of the source from which, under our form of government, aggressions upon popular rights may be apprehended; and it reminds us of the wisdom displayed by the framers of the Constitution, in assigning to separate and independent departments the three great powers of government. They foresaw that under a form of government where there was to be no landed and hereditary aristocracy, to act as a restraint upon the encroachments of executive power upon the one hand, and as a check upon popular outbreaks against established forms upon the other hand, danger to inalienable rights would come, if at all, from the aggressions of legislative power. To guard against such aggressions a constitution was adopted, clearly defining the inalienable rights of man. These rights were not left to the uncertain chronicles of tradition. They were cast by the printer's art into forms more lasting than the laws delivered to Moses, amid the thunders of Mount Sinai, engraved by the finger of God upon tablets of stone. That these rights might remain forever inviolable, the judicial power of the Government, instead of being left a mere appendage of the executive office, was lodged in the hands of a separate and independent department. Into the hands of this department was placed the Constitution, as a great trust, to be read and expounded, with full power to erase from the laws of the land any and all legislative enactments adjudged to be repugnant to the great principles of the social compact thereby established. It is only by a fearless and faithful performance of this trust that the guarantees of the Constitution can be securely maintained against legislative encroachment. If it shall ever come to pass that there shall be a failure on the part of the judiciary to interpose between the Constitution and legislative assaults, American institutions will be imperiled; but so long as they stand firmly by the Constitution, and maintain its integrity against all comers, American institutions will survive, permanent and secure. To this depart-

ment of the Government the appellants come for protection against these great wrongs, and they ask, not for themselves alone, but for the American people, that this atrocious act of legislation be erased from the statutes of the country.

It is respectfully submitted that the judgment ought to be reversed, and the bill of complaint dismissed.

S. W. SANDERSON,
For Appellants.

NOTE.—Since the above argument was printed this Court has decided the case of The United States *vs.* The Union Pacific Company, (called the Credit Mobilier Case.) I have not been able to see the opinion, but I am informed that this Court holds that this contract, in relation to subsidy bonds, is a mere commercial contract, and constitutes no part of the charter of the Union Pacific Company. If that be so, the first point taken in this argument has already been sustained and will require no special notice at the hands of this Court.

S. W. S.

IN THE

Supreme Court of the United States.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Appellant.

vs.

ALBERT GALLATIN, *Appellee.*

BRIEF FOR APPELLEE.

The only question in this case is, ought the Supreme Court of the United States to decide that the act of Congress approved May 9, 1878, entitled "An Act to alter and amend the act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1, 1862; also to alter and amend the act of Congress approved July 2, 1864, in amendment of said first-named act, is void and of no effect."

I.

All presumptions and intendments are in favor of its validity. Grave doubts were entertained at an early day as to whether or not it was competent for the courts to set aside a legislative act, but it was finally decided that the courts had the power of determining whether a given law was repugnant to the principles of the Constitution, with which it was alleged to conflict.

Marbury *vs.* Madison, 1 Cranch, 137.

States were issued and delivered to the Central Pacific Rail road Company to aid in the construction of their road, which bonds were made a first mortgage on the whole line of the road, and the grant of these bonds was made upon condition that the said company should pay them at maturity. By the act of July 2, 1864 the mortgage of the United States was made subordinate to a similar lien for an amount of bonds to be issued by the company equal to the amount granted to it by the Government. These acts were accepted by the company and under them its road was constructed. Whatever else may be said about them it is clear that the railroad company agreed to pay these bonds at maturity. None of the bonds have yet matured. Now it is said that the act under consideration violates this contract because it requires the company to pay these bonds before their maturity. To this the plain and conclusive answer is that it not only does not require the payment of said bonds before their maturity, but it expressly looks to their payment at that time. Substantially this act of 1878 provides a sinking-fund for the payment of the debts of the company when they become due, including the debt to the United States. Is the creation of a sinking fund for the discharge of a debt due in thirty years the payment of the debt, or any part of it, at the time the sinking-fund is created? Sinking-funds are only one of the numberless ways by which means are accumulated to pay a debt which is to become due at some future day. I am not now considering the power of Congress, but the simple question as to whether or not the establishment of a sinking-fund in 1878, to pay a debt due in 1900 is, *ipso facto*, the payment of that debt or any part of it before it becomes due. No part of the debt of the United States is discharged by the existence of a sinking-fund looking to its ultimate and future payment. Now this act compels the payment of these bonds before maturity or it does not. If it does, then contributions to a sinking-fund are *pro tanto* a payment and discharge of the debt to which they are to be applied at some

future day when it becomes due; if it does not, then the contract is not impaired.

V.

When this company agreed to pay these bonds at maturity they necessarily agreed to provide the means for their payment at that time. According to the bill in this case the present indebtedness of the company is $96,000,00 and it is said that when the debt to the United States becomes due that alone will amount to $60,000,000. Suppose the fact to be, and it is so claimed, that the company has neglected and refused to make any provision to meet this indebtedness, but is using all the net earnings of the road to enrich its stockholders. That would virtually be an abandonment of the contract by the company and it would not be in a condition to plead that the United States, in requiring it to make provision for the payment of said debt when it became due, was breaking a contract which it had already practically rescinded.

VI.

To show that the act of 1878 violates the contract of the company to pay the bonds at maturity, it must appear that Congress has denied to it the right to pay or weakened its ability to pay at that time; but Congress has done nothing of the kind—Congress expressly consents in this act to the payment of the bonds at their maturity, and aids the company in preparing for that payment. This act takes nothing away from the company. It simply directs that a certain portion of its yearly profits shall be invested and draw interest for the use and benefit of the company. Not one cent of this money can be used by the Government, and therefore there is no payment. If it was a payment then the money could be used like other money in the Treasury of the United States. Is the direction to the company to invest a certain part of its profits in interest-bearing securities for its benefit and the benefit of its creditors violative of any con-

tract? If so, where and what is the contract? Strictly speaking, the act of 1878 concerns alone the disposition of the profits of the company. Indirectly it is expected to result in the payment of the bonds at maturity, but it relates wholly in its direct operation to the administrative duties of those who manage the corporation. Did the Government agree in the acts of 1862 and 1864 not to interfere in the management of this great military and postal railway, built with the lands and money of the nation for the use of the Government and the people? Contrarywise, the whole tenor and scope of said acts are to the effect that the Government shall have and exercise over this great corporation, which it liberally endowed for public uses, a supervising and visatorial jurisdiction.

VII.

Whether the lands and bonds granted to this company by said acts can be treated as trust funds or not it is manifest that in one, and not a very limited, sense the company was the agent of the Government in the construction of the road. A transcontinental railway was a national necessity. Private parties could not build it with their own means, and it was impracticable for the Government to do the work. Congress, therefore, employed this corporation to construct the road, or a part of the road, and furnished it with the means. Congress never relinquished, or intended to relinquish, the right to require and enforce the application of these means to the use for which they were granted. Coupled with an interest this corporation received lands and bonds from the Government and as its representative or agent, not to construct palaces for its stockholders, but "*to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores*" upon a transcontinental railroad. Assuming that the acts of 1862 and 1864 created this relation between the United States and the company, then it necessarily follows that the Government has the right in some degree to interfere in the

management of the company, so as to protect the public interest; and it is for Congress, under Constitutional restraints, to determine to what extent that interference is proper and necessary for that purpose.

VIII.

Doubtless it will be argued that if this right to interfere exists at all it only arises upon some default by the company and it will be claimed that no such default has occurred. That is a question this court cannot consider. No power exists here to go behind an act of Congress and inquire into the motives or reasons for its passage. This court is to take up the Constitution and the act and compare them; if they can be reconciled, the act is to stand; if not, it is to be set aside.

Thus far this court can go and no farther.

Whether or not there was such a delinquency on the part of the company as to make this act of 1878 necessary was the exact question before Congress. Some affirmed and others denied the delinquency. The affirmative carried "by a large majority." That question, therefore, is settled. Suppose it appeared to Congress that there was danger, under the present management, that the road, though built, would be ultimately lost to the use of the Government. Would it not be proper for Congress to take the necessary steps to prevent that result? Can this court say that an act of Congress looking solely to that end is unconstitutional?

The grants to this company were upon the condition, among others, that it should keep its road in repair and use, and *at all times* transmit upon it public stores, troops, &c., &c. This court holds that upon a conditional grant of this kind Congress may declare and act upon a non-compliance with the condition. (Schulenberg *vs.* Harriman, 21 Wallace, 44.) Be this, however, as it may, I insist that the supervisory power of Congress which it exercised in the act of 1878 exists without, as well as with, a default by the company.

Congress, seeing the sacrifice and ruin of the public interests involved in this railroad impending, is not bound to await the catastrophe before it acts, but may and should interpose to prevent what, if accomplished, will be without remedy.

IX.

Great effort will be made to refine away the sovereign authority of the Government over this company and to put their relations upon the footing of a contract between private parties. Whatever plausibility this argument may have, it is unsound. All the legislation as to the Pacific railroads look to the public interests. Public considerations induced its construction. Public considerations require its preservation. Congress had no power and did not intend to abrogate its authority to protect the public interests involved in this railroad, by an arrangement with a corporation to build it. Congress made the Government a party to this arrangement, as a Government. Entering into this understanding were not only the contractual relations of the parties, but the functions of the Government as the guardian of the public interests. Congress has no constitutional power to give to a corporation $29,000,000 of United States bonds, to be used as the stockholders of the corporation may choose. Any such contract made by the authority of one Congress could be lawfully rescinded by another and subsequent Congress. Congress may give that amount of bonds to a corporation to subserve the public interests, but it cannot legislate or contract so that a subsequent Congress may not provide that such bonds shall be applied to the purposes for which they are given. Congress cannot surrender the military and postal affairs of the nation, beyond the control of the Government, to a corporation. From the very nature of the Government, there is implied in any contract which it makes pursuant to an act of Congress for the public good a reservation of legislative power, to secure the due execution of

such contract, to the end that the public good may be attained.

X.

But it is said that this act of 1878 imposes new obligations upon the company. If that were true, it does not prove the unconstitutionality of the act. This company, though originally chartered by the Legislature of California, may be said to have become, by adoption, a corporation of the United States under the acts of 1862 and 1864. It is a public corporation, established and endowed for public uses. May not Congress exercise legislative control over such a corporation? Has not Congress changed the law and imposed new regulations and new duties upon National Banks since they were organized? But in fact, no new obligations are imposed upon the company by the act of 1878. It simply requires the company to provide the means, which it ought to do without any legislation by Congress, to pay at maturity, as it has agreed, the bonds which it has received from the Government. Common sense teaches that $60,000,000 cannot be paid at a given time without any preparation for the payment; therefore it was a necessary part of the obligation of this company to pay such bonds at maturity, that it should prepare for such payment. To enforce this preparation is only to compel the performance of an old and existing obligation. Congress says to this company, "You will, at a no-distant day, owe $120,000,000. You are dividing the enormous profits of your business among your stockholders. You are putting the proper means of paying your debts beyond the reach of your creditors. You shall save some of these profits for them. You shall deal fairly with those whose money you have used in building your road. You are a public corporation of the United States, and it is my right and duty to compel an honest administration of your affairs." This, and nothing more.

XI.

Independent of any express reservation of power in the acts of 1862 and 1864, it would seem that Congress has the right to pass the act of 1878; but section 18 of the act of 1862 contains this clause:

"And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said companies named herein, *add to*, *alter*, *amend*, *or repeal this act.*"

Section 22 of the act of 1864 is as follows:

"That Congress may, at any time, *alter*, *amend*, *or repeal this act.*"

XII.

To argue in favor of the validity of the act of 1878, upon these clauses, is like an effort to polish the diamond; but it is proper, perhaps, that some attention shruld be given to the great learning and ingenuity that will be displayed on behalf of the appellant to show that Congress, in the abovecited paragraph, meant one thing and said another. To begin, I insist that the words of said clauses must be taken by this Court as they stand. There is no uncertainty or ambiguity about them. The meaning of each word is well defined and well known. This Court, in the case of the United States *vs.* The Union Pacific Railroad Company, 1 Otto, 85, in deciding against the Government, rigidly enforced the rule of adhering to the words of the staute, and now that ruling is invoked in favor of the Government.

Mr. Justice Davis says in that case, quoting from Justice Buller, "We are bound to take the Act of Parliament as

they have made it, a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed is tyrannical or not."

Now, when Congress says that it may "add to," "amend," or "repeal" this act, what does it mean? Does it mean that it can add to, amend, or repeal the 18th section of the Act of 1862, and that it cannot add to, amend, or repeal any other section or part of the act? Is that giving to words their natural and obvious meaning? If Congress can repeal "the act," then of course it can repeal any section or part of the act, if it be true that the whole of a thing embraces all its parts. When Congress says it may "add to" the act, what does it mean? It means, if anything, that Congress may, by additional legislation, impose such other duties and obligations upon the corporation as are necessary, in its judgment, to protect the public interests and effectuate the purposes of the act. If Congress is of the opinion that the company is trying to defraud the Government, then Congress may add to these acts whatever is necessary to prevent such frauds. To deny to Congress this power, under said clauses, is simply to nullify them.

XIII.

It will be urged with great earnestness that the right reserved is a right to repeal or amend the franchises of the corporation, but not the contract between the Government and the company. It was decided in the Dartmouth College case that the charter of a corporation was a contract. Corporations derive their franchises from their charter. A contract is a contract, and one sort of contract is as sacred as another.

Now, if a legislature can repeal a charter under a reserved power of repeal therein, and take away the franchises of a corporate body, why can it not also, under the same power, repeal any other contract between the legislature and said body contained in the act of incorporation. To defeat the

doctrine of the Dartmouth College case, and the argument here for the railroad company is the very object of inserting in acts of incorporation an express right to repeal or amend them.

"You shall not plead," says the legislature, to these corporations in the act of their creation, "when future laws become necessary to protect the public interests from your injustice or cupidity, that you are beyond our reach by virtue of a contract." It is in vain to attempt to confine the right of repeal to any alleged franchise of this corporation. Congress says to the Central Pacific Railroad Company of California, incorporated by the legislature of that State: "You may come into the Territories of the United States and build a railroad upon the same terms and conditions as are given to the Union Pacific Railroad Company, and we grant you the right of way; but we reserve the right to add to, alter, amend or repeal this act. This is accepted and agreed to by the company. The above is the substance of all there is in the acts of 1862 and 1864 as to the California company. Now what are the franchises here granted as distinguished from a contract. Congress, of course, did not reserve the right to repeal the act of California incorporating this company, but it reserved the right to change, or repeal, exactly what it had enacted as to said company. It reserved the right to change the terms and conditions proposed in said acts. Putting aside nice distinctions the whole thing is an agreement between the United States and the California company, by which the former agrees to furnish the means and the latter to build the road, and to put itself as to said road under the legislative jurisdiction of Congress. The fallacy of the argument on the other side lies in setting up a contract and excluding some of the express stipulations which it contains. It was expressly agreed between the Government and this company that Congress should have the right to repeal or modify the agreement between them. The company was then willing to trust its interests to the justice and wisdom

of Congress. Now, when Congress undertakes to do what it agreed that Congress might do, it says that Congress is violating the contract.

XIV.

Congress having provided that the bonds of the United States given to the company should be redeemed by it at their maturity, it is contended on the other side that this is the contract; but the fact is it is not the contract, but only a part of it. Congress of course cannot require the company to redeem these bonds before maturity, because the holders are not bound to receive payment before they become due; but if it was practicable it would be constitutional for Congress to require an earlier payment, because the company filed its assent in the secretary's office to the whole act and not to this provision alone, and *the act and the assent* constitute the contract, in the body of which it is stated that Congress shall have the right to change this or any other provision.

XV.

It will be argued that the act of 1878 takes away from the company a vested right. To that it may be answered that it only takes away from the company the right to dispose of its profits so as to defraud its creditors. It does not operate upon anything now in the hands of the company but takes effect upon its *future earnings*. The company has no vested right in these, because they do not exist. And here a distinction is to be observed. Titles to personal or real property that have passed, it may be admitted, cannot be divested without the consent of those who hold them, but said act attempts nothing of this kind, it simply directs a portion of the moneys *hereafter* coming into the hands of the company, to be placed in a sinking fund. It touches no vested right. Creditors under every system of law have a *quasi* right in the property of their debtors. A debtor has

not an absolute right to dispose of his property as against a creditor. Attachment, injunctions, the appointment of receivers and similar proceedings, all recognize a certain right in creditors to the property of their debtors. When upon the application of a creditor a receiver is appointed to take charge of the property and business of a corporation the law deprives the officers and stockholders of that corporation of the control and disbursement of the receipts from its business. Let it be remembered that all that this act proposes to do is to require a reasonable provision to be made for the creditors of the company.

XVI.

I do not contend that the power of Congress is unlimited. To repeal the acts of 1862 and 1864 would not of course divest title to lands or to the bonds that have been sold by the company. It is very difficult if not impossible to draw the line of demarcation between what Congress can or cannot do under the reserved right to repeal or amend the acts in question. Some things it is admitted it cannot do and some things it must be confessed it can do, under said right. This act is one of the things it can do. I believe it to be good law that any legislature creating and chartering a public corporation like a railroad company may by subsequent laws so regulate and control its business operations as to prevent oppression, injustice and fraud, especially upon the public, and especially when the right to amend or alter the charter is reserved in it.

This court in Holyoke *vs.* Lyman, 15 Wallace, 519, lays down the law as follows:

"But it may safely be affirmed that the reserved power may be exercised, and almost to any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs, *so as to protect the rights of the stockholders and of creditors, and for the proper disposition of its assets.*"

Does the act of 1878 do more than to provide for a proper administration of the affairs of the company? Is it not too plain for argument that the sole object of the act is to protect the rights of its creditors, and so permanently save the road to the use of the Government?

XVII.

The question here presented is not new to the law-writers and courts of this country. Pierce, on the Law of Railways, page 36, says:

"The power to amend, alter, or repeal the charter may be reserved by the legislature by a provision to that effect inserted therein, or in a general law applicable to all acts of incorporation afterward passed, and the right of the legislature to alter or repeal the charter is thus *made a part of the contract.* The charter of the company is by such a reservation subject to any reasonable amendment or alteration which the legislature may make, and any *reasonable additional obligations* may be imposed on the company."

Are not the obligations imposed by the act of 1878 upon this railroad company reasonable, and did it not agree, in accepting the acts of 1862 and 1864, that Congress should have the right to impose upon it such obligations?

In the case of the Northern Railroad Co. *vs.* Miller, 10 Barbour, 282, the Supreme Court of New York say:

"It was competent for the State having the power to grant or to withhold the charter, to annex such condition to the grant, or to make such reservation as it pleased. The directors, trustees, or other managing agents, by whatever name they are called, by accepting this charter he became bound by this condition or reservation, and every individual who subscribed to the stock of the company thereby makes himself a party to the contract, subject to the conditions and reservations of the charter. In effect he stipulates at the time he subscribes that the legislation may alter or repeal the law, and thus change the obligation of his subscription or defeat it altogether.

It cannot, therefore, with truth, be said that the amenda-

tory act which is complained of in this case, was an alteration of the defendant's contract without his assent. It was merely such an alteration as he himself, by becoming a party to the contract, had agreed that the legislature might make. He is as much bound by it as if he had signed a petition to the legislature requesting the passage of the act in question. Whatever modification is thus effected in the obligation created by his subscription is made by his own agreement, and entered into the moment he became a party to the contract, and is as binding upon him as if it had been accomplished by his own solicitation and procurement. It surely cannot be necessary to cite authorities to prove that what a man authorizes another to do is as obligatory upon him when done as if it had been performed by himself."

In the case of the Reciprocity Bank, 22 N. Y., 9, the court say:

"Regarding this reserved power to alter, modify, or repeal as a part of the contract, its literal and obvious interpretation is that the franchises and privileges granted were at all times subject to abrogation or change by the legislative power of the State."

Chief Justice Shaw says, in the case of Roebury *vs.* The Boston and Providence R. R. Co., 6 Cushing, 422, that when a railroad company takes its charter subject to a reserved power to amend, &c., "it must be bound by any reasonable amendment and alteration the legislature may hereafter make."

Oliver Lee & Co.'s Bank, 21 N. Y., 9, was a case where stockholders of a bank organized under an act of the legislature exempting them from individual liability. Subsequently the constitution and laws of the State were so changed that such stockholders were made individually liable for the debts of the bank. *Held* by the court that, as the original act reserved a right to amend or repeal, the second act, changing and increasing the liability of the stockholders, was valid. So in the case of the Mayor and Aldermen of Worcester *vs.* the Norwich and Worcester Railroad

Co., 109 Mass., 108, it was held that an act of the legislature changing the stations of the railroad company, extending its track, and subjecting it to an expenditure of hundreds of thousands of dollars, was valid, because it was chartered under a law reserving the right to amend or repeal. Many similar cases from the State courts could be cited. This court has more than once passed upon the same question.

Mr. Justice Nelson, in the case of Sherman *vs.* Smith, 1 Black, 587, where the facts were like those in Oliver Lee & Co.'s Bank (*supra*), and the same acts of the legislature were involved, says, assuming that there was a contract:

"Now the 23d section, which reserved to the legislature the power to alter or repeal the act by necessary construction, reserved the power to alter or repeal any or all of these terms and conditions, or rules of liability proscribed in the act."

In the Pennsylvania College cases, 13 Wallace, 190, the court declares that a reserved power to amend or repeal, authorizes "the State to make any alteration in the charter which the legislature in its wisdom may deem fit, just, and expedient to make."

In Miller *vs.* The State, (15 Wallace, 500,) speaking of this reserved power, this court says it "reserves to the legislature the authority to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or other public or private right."

Can anybody deny that the act of 1878 is intended to secure both public and private rights?

In Tomlinson *vs.* Jessup, (15 Wallace, 454,) this court say of this reserved power:

"It is a provision intended to preserve to the State control over its *contract* with the corporators, which, without that

provision, would be irrepealable, and protected from any measure affecting its obligations."

This clearly implies that a legislature can repeal a contract under this reserved power. Peik *vs.* Chicago and N. W. Railway, 4 Otto, 164, and Chicago, Milwaukee, and St. Paul R. R. Co. *vs.* Ackley, 4 Otto, 179, are cases in which this question is elaborately discussed. There it is held that the legislature of a State had the right, under this reserved power contained in its constitution, to fix a maximum of charges over a railroad company, though its income had been pledged to its creditors upon the faith of a compensation for transportation unrestricted by the charter.

In Shields *vs.* Ohio, 5 Otto, 319, Mr. Justice Swayne, in delivering the opinion of the Court, says:

"It is urged that the franchises in question was property held by a *vested right*, and that its sanctity, as such, could not be invaded. The answer is, *consensus facet jus*. It was according to the agreement of the parties. The company took the franchises subject expressly to the power of alteration or repeal by the general assembly."

This Court, in Railroad Co. *vs.* Maine, 6 Otto, 499, lays down the law as follows:

"Under the law the State retained the power to alter in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges, and immunities. The existence of the corporation and its franchises and immunities, derived directly from the State, were thus kept under its control."

XVIII.

I can conceive of no ground upon which this case can be placed outside of these authorities. To say that the act of 1878 violates a contract does not answer the purpose. All the decisions cited hold that a charter granted by a legislature to a railroad company is a contract, and they also hold that under a right reserved in such charter to amend or re-

peal the same, the legislature may change, modify, and repeal that contract. Is one contract more sacred in the eyes of the Constitution than another? Does the Constitution protect a part of a contract and at the same time allow a repeal of the whole of it?

XIX.

Surely it is too late now to discuss the constitutionality of these reservations of power in acts of Congress or of State Legislatures, but as the Central Pacific Railroad Company filed its assent to the acts of 1862 and 1864, accepted and acted under them, and enjoyed the privileges and immunities which they conferred, it is now estopped from setting up the unconstitutionality of said acts, or any part of the same.

Houstin *vs.* Wheeler, 52 N. Y., 641.

XX.

Section 6 of the act of 1862 provides that all "compensation for services rendered for the Government shall be applied to the payment of said bonds and interest, until the whole amount is fully paid." Here the act provides for the payment, or a security for the payment, of the bonds before maturity. Now, if the profits of the road are unexpectedly large, why may not Congress amend this provision, so as to include a part of these profits? To secure indemnity to the Government for the bonds delivered to this company is one of the objects of the act. Why may not Congress amend this as well as any other part of the act, so as to effectuate the object therein declared? Congress did amend this provision by enacting in sec. 5, of the act of 1864, that only one half of said compensation should be applied to the payment of said bonds. The act of 1878 requires the other half of this compensation to go into the sinking-fund, and in this respect it is claimed that it violates the contract of 1864, that only one-half should be required for the payment of the

bonds. Without admitting that the sinking-fund is a payment, what was this contract of 1864? Congress said to the company, we will retain only one-half of the compensation for Government services on account of these bonds, instead of the whole, as originally provided. You say it is necessary. We do not know. Time can only determine. But if we grant you this privilege you must understand that we reserve the right to alter or amend the grant, as the future public interests, in our judgment, may require. Was not that the real contract between the parties?

XXI.

Considerable stress is laid upon section 18 of the act of 1862, which provides that when the net earnings as therein defined shall exceed ten per centum of the cost of the road, Congress may reduce the rates of fare, &c.; and it is claimed that this is a contract, that the company shall have all the net earnings when they do not exceed said ten per centum. To this the first answer is, that the company does get all of said net earnings, but a part of them go to a sinking-fund of the company, and the balance to dividends for the stockholders. Second. This is exclusively a stipulation as to the rates of fare, and Congress has not reduced those rates, contrary to said stipulation. Third. There is no implication that the company may use these net earnings so as to defeat any of the objects of the act, and injure the public interests. Suppose the officers and stockholders should put these earnings into their pockets and neglect to keep the road in repair, would not Congress have the right to interfere for the public good? Fourth. The right to alter and amend enters into this as well as all other parts of the act. If Congress be of the opinion that it is necessary to amend this part of the act so as "to secure at *all times* the use and benefit of this road for postal, military, or other purposes," it has the same right to amend this as it has to amend any other section of the act. Congress recites and decides, in the preamble to

the act of 1878: that the interests of the United States, a-mentioned in said acts of 1862 and 1864, are not, and can not be, secure without this legislation, and that is the end of controversy upon that subject. This court has no right to say that the public interests do not require this legislation. If it be true, this court may say that the act is unconstitutional. That is the extent of its jurisdiction.

XXII.

It is said that the company has faithfully performed its part of the contract with the Government. That, as before said, is a question outside of the jurisdiction of the Court in this case. Whether there has been a default or not upon the part of the company, is a question for Congress. There is no evidence before this Court, one way or another, upon that subject. It is expressly held in Crease *vs.* Babcock, 23 Pickering, 334, that in respect of a legislative charter to a corporation as to whether or not there was a default by such corporation at the time its charter was amended or repealed, a legislative and not a judicial question.

XXIII.

It may be said that Congress has no right to define what the net earnings of the company shall be, as it does in the act of 1878, but it is impossible to see, if Congress has the right to amend the acts of 1862 and 1864 at all, why it has not the right to amend in this respect; and besides it is decided in Hospital *vs.* State Mutual Assurance Company, 4 Gray, 227, that it is a proper exercise of the amending power under a reservation to amend or repeal the charter of a corporation to declare by law what the net earnings of such a corporation shall be.

XXIV.

It is hardly necessary to say that the acts of 1862 and 1864 are in *pari materia* and are to be taken considered as

one act, and that all the rights, privileges, and immunities of the company were acquired after the passage of said act of 1864, the 22d section of which is, "Congress may at any time alter, amend, or repeal this act."

XXV.

To conclude: Is not this act of 1878 a fair and reasonable act? Ample provision is made for all the expenses of the company and for the payment of all interest due upon its indebtedness. There is no disturbance of the present possession and use of the road. All the rights, privileges, and immunities of the company remain untouched, except that seventy-five per cent. of the net earnings, instead of all, is to go into the pockets of the stockholders, and twenty-five per cent., and, if the interests of the road require, a less sum, is to go into a sinking-fund, for the benefit of all the creditors of the company. That the sinking-fund is to be in the Treasury is not objectionable, for, if there is to be one, the safer and more permanent it is the better for all concerned. Compound interest will accrue upon said twenty-five per centum. There is no attempt here to oppress, embarrass, or injure the company. Congress has carefully and fairly tried in this act of 1878 to secure the public interests without wrong to the company. Any body can see that this act does not affect the company as a company, but its sole effect is to withhold something from private pockets for the benefit of creditors, by the use of whose money the stockholders of this corporation are made millionaires.

GEO. H. WILLIAMS,
For Appellee.

IN THE

Supreme Court of the United States.

THE CENTRAL PACIFIC R. R. CO., *Appellant*,

vs.

ALBERT GALLATIN, *Appellee*.

I have seen the brief for the appellant since mine was prepared for the appellee. I think I have in substance anticipated all that it contains excepting, perhaps, one or two points.

1st. It is contended that the act of 1878 appropriates to the sinking-fund which it creates net earnings of other railroads belonging to the company besides those of the Pacific Railroad.

I.

This is clearly a misconstruction of the act. Section 1 defines what the net earnings provided for in the act of 1862 shall be. These of course are earnings of the railroads provided for in that act.

Section 4 requires the company to pay into the sinking-fund certain sums of money, amounting in the aggregate "to twenty-five per centum of the whole net earnings of the said railroad company, *ascertained and defined as hereinbefore provided.*"

That is to say, the company shall take the gross receipts of its road built under the act of 1862, and from those it shall deduct expenses, interest, &c., as provided in section 1 of the act of 1878, and the balance of said receipts in its hands, after these deductions are made, shall constitute those net earnings the twenty-five per centum of which is to go to the sinking-fund.

II.

Taking the argument for the appellant together as to a contract and it amounts to this:

The Central Pacific Railroad Company is a corporation of the State of California and derives its franchises from the legislature of that State; therefore, Congress cannot touch the franchises of this company.

The provisions of the acts of 1862 and 1864 as to said company constitute a contract with it, and Congress has no power to alter or amend that contract; therefore, all the rights, powers, privileges, and immunities which said company acquired or held under said acts are beyond the control or any legislative interferences therewith by Congress.

Let this argument be true and the reservation in said acts of 1862 and 1864 of the right "to alter, amend, or repeal" the same are deprived of all possible meaning, force, or effect. What do these words mean? What office do they perform? What use have they in the act, if the above be a correct contention?

Is this court prepared to wholly expunge these words from said acts; to hold that Congress did not know what their meaning was, or knowing did not intend that they should have any effect? If this court cannot, by judicial legislation, repeal and declare void section 18 of the act of 1862, and section 22 of the act of 1864, then they must be allowed to stand, and have some force, and, as heretofore, I insist, that by the consent of said company, Congress, in these sections retained the right and power to make all such reasonable laws, additional to or amendatory of said acts, as in its judgment should become necessary to protect the interests of the United States in said road, and to preserve it for the postal, military, and other purposes of the Government. To argue that the act of 1878 is necessary to protect the public interests, and a reasonable measure for that purpose, approaches an insult to the intelligence of this court.

III.

I need not notice what is said about the unconstitutionality of these reservations in the acts of 1862 and 1864, both because the question is settled and the company cannot now raise it, and as to the argument that the Constitution delegates no power to Congress to alter a contract, it is enough to say that if Congress can make a contract with a railroad company, it can include in it such conditions and limitations as it chooses, and to which the company assents. This is giving to Congress no greater right than a citizen has in making a contract. All the contracts with the Government for the construction of public works and buildings, and for carrying the mails, contain reservations of the right to terminate them, by the action of the executive branch of the Government, and the validity of such reservations, and the right of the Government to dissolve contracts thereunder, have been recognized by this court.

IV.

As to vested rights. If this court did not decide in the so-called "Granger cases" that a railroad company had no vested right in its future earnings, then it decided that a railroad company could be deprived of vested rights by the legislature granting its charter. I take the effect of these decisions to be this. The railroad company, under a charter which contained no restrictions as to its rates of fare, gave securities to its creditors covering the income of the road—that is, when the road was charging, say five cents per mile for the transportation of a passenger under a charter which allowed it to make such a charge, said securities were executed and delivered, and afterwards the legislature declared that said railroad company should charge only three cents per mile for the transportation of a passenger. This act was held valid.

But the question here is not whether the company has a vested right in its future earnings, but whether the stock-

holders have a vested right to have those earnings converted into dividends and paid to them.

Nothing is taken away from the company as a company by the act of 1878. Congress assumes the right to interfere so far with the management of the company as to say that a certain part of the net earnings shall be used so as to protect the public interests, but the right of property is not assailed or disturbed. The company is as much the owner of every dollar that goes into the sinking fund as it would be if it was put into a bridge or depot.

Have the stockholders of this company a vested right in a dividend which they expect will be declared out of the future earnings of the company? There is an infinitude of contingencies between this expectation and the existence of a dividend.

The public interests in this public corporation are paramount and more perfectly vested than the private right of a stockholder to a dividend which has never been declared or earned.

GEO. H. WILLIAMS,
For Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 972.

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND STANFORD, AND OTHERS,

Appellants,

Vs.

ALBERT GALLATIN,

Appellee.

ARGUMENT OF HON. B. H. HILL, OF GEORGIA, FOR APPELLANTS.

Judd & Detweiler, Printers.

Supreme Court of the United States.

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ARGUMENT OF HON. BENJ. H. HILL, OF GEORGIA, FOR APPELLANTS.

Mr. HILL said:

May it please your Honors: After the filing of such able briefs, and after the elaborate oral arguments on authorities, which have been made in this case, I think it unnecessary for me to do more than present the views I have of the issues involved, founded upon reason and admitted principles of law and right.

My purpose is to go directly to the marrow of the case as I understand it—to that point which controls the case—discuss that, and leave it to your honors. After having heard and read so much in relation to the controversy now before the court, it does occur to me that there is but one single question in it, after all. That question is this: Can the United States, being a party to a mere simple commercial contract, in which considerations have passed from each

to the other of the parties thereto, and after that contract has been so performed by both parties that the rights and obligations of both have become fixed, can the United States, by legislative will alone, and without the consent of the other party, change the terms and stipulations of that contract? and especially, can the United States, by such legislative will, and against the consent of the other party, vary and increase the obligations of that other party to the contract, and at the same time retain and even increase the rights and benefits of the United States in that contract? That is the question; and I confess I can see nothing else in the case, and it seems to me the very statement of the question furnishes the answer.

The first point, therefore, to be ascertained in discussing this question, is: What is the contract between the parties, and is it a simple, plain, commercial, business contract, such as exists between individuals every day? Is it a contract in which there is no sovereignty? Is it simply a business contract in which the parties stand on equal terms, each able to consent and does consent to stipulated terms, and for mutual considerations?

Right here a little history, though perfectly familiar to your honors, it may not be uninteresting to repeat, because in discussing these legislative acts, and the objects, motives, and meanings of the contracting parties, we ought to look at the circumstances which surrounded both at the time the contract was made, and the inducements operating upon them. That is a well settled rule of construction, and a wise one.

In 1862 the United States desired the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean. The reasons why the United States desired the construction of that railroad and telegraph line are well known to us. They were not simply commercial reasons, they were not simply benefits to the country in the way of business, nor in the way of profit, nor even for the

purpose of developing the country through which the road should run, nor for the purpose of extending civilization. We all know, as a fact, that the great, the controlling, the overshadowing object of the chief men who inaugurated this legislation was to preserve the integrity of the Government which they believed to be seriously involved by the separation of the Pacific coast from this portion of the country. They had the other objects in view, of course. They believed that the construction and maintenance of this great railroad to the Pacific Ocean would benefit the country and the Government, commercially and materially, in many ways; but they also did far more earnestly believe that it would, in a large measure, have the effect of preserving and perpetuating the very integrity and existence of the Union.

This is a historical fact, and it is our duty to look at this legislation in the light of this fact. So overshadowing was this purpose and desire, and so absorbing, that the ablest and most active of those statesmen who were engaged in inaugurating this legislation, as you will see by reference to the records of those times, declared that the end to be accomplished was so overwhelming that they would extend this aid to these railroads if they knew in advance that the Government would never recover one dollar of the loan.

And yet I suggest to your honors, this case has been argued too much upon the idea that one of the great objects of this legislation was to make this loan, and was enacted for the purpose of making a loan! The exact reverse is the truth. The Government did not desire the construction of the road in order to make a loan, but was willing to make the loan as one of the means of securing the construction of the roads. The loan was a means to the end precisely, as was the grant of public lands; and the making of the loan was no more the granting of a franchise than was the conveyance of the lands. The loan of the funds and the grant of the lands were proposed and accepted for

the same object as inducements to undertake the building of the roads, and were executed for *the same consideration*—the labor and risk of building the roads—became equally and alike vested rights, and cannot be affected by any change or repeal of the acts which authorized them. This will all most abundantly appear by a simple narration of the recorded official facts.

To accomplish this great desire of the United States—a desire existing solely with the Government—the act of 1862 was passed. That act adopted a corporation already in existence by the laws of California, and created another corporation and called it the Union Pacific. But these corporations were unable to do this work. No private corporations then existing had the means to perform so great a work. The construction of this grand internal work was such as no Roman, or Grecian, or builder of Egyptian pyramids had ever conceived. There is nothing like it. It was the grandest enterprise of this or any other age. No company could accomplish it, and the Government being unwilling itself to build the road, as its own property, and desiring to induce its construction by these corporations, felt that it was right, as well as necessary, to furnish aid to the corporations to enable them to accomplish the work.

Therefore, by the act of 1862, the Government proposed to these corporations thus: "We will give you the right of way through the public lands free of cost; we will allow you to take all the timber, stone, and other materials you desire in the construction of this work from any portion of the public domain; and we will grant to you a large quantity of the public lands in fee in alternate sections on either side of the road." But all this was not sufficient, for the right of way brought no funds, and the lands proposed to be granted would be valueless until after the construction of the roads should open them to settlement.

The Government, therefore, further said: "We will lend you the credit of the United States for the purpose of ena-

bling you to raise the means to do the work; and that you may be induced to accept this loan, we will give you a credit of thirty years for its repayment; we will charge you only six per cent. interest on the loan, and until its maturity we will ask you to repay to us of this interest only the amount that may be due you for transportation for the Government and five per cent. of your net profits."

What was all that for? Were not the United States offering terms to induce these corporations to undertake this great work? Was not the length of credit one of the inducements? Were not the smallness and convenience of the payments, to be made before the expiration of the thirty years, also intended as inducements to these corporations to take this loan and undertake to build this road? Clearly so. No man will or can doubt that all this is true.

The Government still further said by this act of 1862: "We must have security that this loan will be repaid *at maturity;* but in this you shall not be embarrassed, for we regard the roads to be built as of far more value than the sums we advance, and we will be content with a lien on the work, and therefore propose that the issue and delivery of the bonds shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures and property of every kind and description, *and in consideration of which said bonds may be issued.* As you construct the road in sections of twenty miles the bonds shall be delivered; your rights thus becoming vested, and the delivery of the bonds shall constitute *ipso facto* a mortgage lien on the road for the repayment of whatever sum may be due under this contract at the maturity of the bonds."

That was all a very plain proposition. But with these liberal offers, after waiting two years, nothing was done; the corporations could not undertake the construction of this great railroad and telegraph line even upon these liberal terms, and the Government saw that it would not be

able to accomplish its great purpose. Therefore came the act of 1864. The great object of this act of 1864 was to increase the inducements to the companies to do this work. It was a vast enterprise, a daring enterprise, and required immense energy and courage. It was an enterprise to undertake which required a courage equal to, if not greater, than that which sustains the bravest in battle.

So the Government said: "as the inducements we offered by the act of 1862 are not sufficient, we will increase those inducements." How? 1. "We will double your land grants." 2. "We will agree that you may issue your own bonds of like amount with the bonds issued by the United States to you, and, that those bonds may be valuable in the market and enable you to raise money upon them, we will subordinate the first lien that we took under the act of 1862, to the lien of the bonds you shall issue."

The third new inducement was as to the terms of payment, and there was just this change: The act of 1862 required that *all* the sums due for the transportation of the Government should be applied to the extinguishment of the debt previous to its maturity. The act of 1864 changed that, and proposed that "only one-half" the transportation of the Government should be so applied. So that the proposition as to the repayment of this loan now became simply this: "you will pay presently, and as it accrues, only one-half the amount due you for transportation for the Government, and five per cent of your annual net profits; and you will be asked to pay no more until the expiration of thirty years." Can motive or inducement be plainer?

Well, these changes had the desired effect. They called into active energy the enterprise of the country, and, men gathered together, formed the companies, went to work, and astonished the world with the marvelous results, connecting the waters of the Pacific Ocean with the Missouri river by iron rails over and through great mountains and a savage and wilderness country, *in five years!* The Govern-

ment agreed to be satisfied if that great work could be accomplished in twelve years; and they accomplished it in five.

The act provided that as twenty miles of railroad should be completed, and adjudged completed in the manner provided, the Secretary of the Interior should grant patents to the public lands, and the Secretary of the Treasury should issue the bonds, called the subsidy bonds, in pursuance of the contract.

Now, may it please your honors, here is the point: Under that contract, with those conditions, encouraged by these inducements, the road was built. It was built to the satisfaction of the Government; the great public work was completed, and the Government issued its bonds, and granted title to the lands; the companies took the bonds, and thus the consideration on both parts of this contract was actually performed. What was the consideration on the part of the companies to entitle them to bonds? That they should build the road; and they built it. That is what they were to do to entitle them to the bonds. What was the Government to do? Issue and deliver the bonds; and the Government did it. Both parties performed their part of the contract; it was completed perfectly and thoroughly. Were there no vested rights there?

Talk about vested rights! Did not the companies have not only the vested right to those bonds, but did they not also have a vested right to that road, subject to the obligation to pay the debts incurred *as those debts became due*, according to the stipulated terms; and were not those terms that if they paid to the United States five per cent. of their annual net earnings, and allowed the United States to retain one-half the transportation for the Government; for the balance, principal and interest, the Government would wait thirty years? What could that mean, except to say to those companies, whatever may be the net profits of this great work over and above these stipulations, and the pay-

ment of interest on your other bonds, and the expense of keeping the road in repair—keeping up this great work—you shall dispose of and enjoy as you please. Was not that a vested right?

There was the offer. That offer was accepted, and the contract was made. The work was done in execution of that contract; the bonds were issued and delivered also in execution of that contract; and the rights of all parties became vested, complete, and perfect. The Government became absolutely entitled to the repayment of that money according to the terms of that contract, *and only according to the terms of that contract*, and the companies became absolutely entitled to use that great road, which was theirs and which they had built, subject only to that contract; and as long as they keep their contracts the Government is under every obligation to protect them, and can have no right, constitutional, legal, or moral, to complain of them, and much less to rob them.

Now, it seems to me, therefore, that there cannot be two opinions as to the character of this contract of loan between these parties. It is a mere commercial contract, a mere business contract. What else is it? A loan offered and accepted with all the conditions of a loan performed and considerations passed from each to the other. That is all. It is such a contract as individuals make every day. It requires no franchise for that, it requires no exercise of sovereignty for that. It is true that the Government, as a sovereign, authorizes the loan, but the contract was not made *by* the act, but *under authority* of the act, and the United States became a party to the contract of loan as a civil corporation.

Now, then, the next question is, as this is a contract, what are the changes proposed by the act of 1878, and how does the Government propose to accomplish and effect those changes?

[At this point the Court adjourned, its usual hour for adjournment having arrived.]

FRIDAY, *March* 21, 1879.

Mr. HILL. May it please your Honors, I have endeavored to place distinctly before the Court, in as simple a manner as possible, the real character and terms of the contract of loan between these parties, the circumstances under which that contract was made, the motives which prompted the United States to propose the contract, the inducements which were held out to the other party to accept the contract, the performance by both sides of the conditions of the contract, by all of which the rights and obligations of both parties to the contract became established and fixed.

Gentlemen strangely say this is not an executed contract. Our learned brother, ex-Attorney General Williams, made the statement that it was not an executed contract because the debt has not yet been repaid. That is not my understanding of an executed contract, that it is not executed until it is discharged. That would be a discharged contract; that would cease then to be a contract; it would have no existence. So, according to the distinguished gentleman's designation of an executed contract, all contracts would be simply executory until they were discharged, and then there is no such thing as an executed contract. Now, an executed contract is one in which the conditions of performance are executed, performed, and the rights and obligations of the parties have become fixed and established—vested—and the consideration passed. By virtue of the grant of franchises and the terms of that grant, the United States, as a sovereign, has a certain supervision over the railroad, as a corporation, to accomplish the objects of its construction. By virtue of the terms of the grant, and also in consideration of the aid extended in lands and bonds, the United States have a right to demand preference in transportation over the line, and that right of the Government is fixed and established and cannot be denied. By the building of the road and the completion of the work this company became entitled to the grant of lands and the delivery

of the bonds, and by delivering the bonds the United States became entitled to demand repayment according to the terms stipulated. What each party was to do to establish a right in either has been done. Therefore it is an executed contract. The obligations which are unperformed in the shape of repayment are simply results of the execution, but which obligations are established and fixed. It is an executed contract, therefore, but the obligations fixed and established by the contract are not all discharged finally. That is all.

In the next place, I desire to present to your honors (and I trust your honors will pardon me for doing what seems to be unnecessary) as clearly as I may be able the changes in the terms and stipulations of this contract which are sought to be *legislated into it* by the act of 1878. I use the term "legislated into it" as the proper term, because that is the only way by which an attempt is made to change the terms and stipulations of this contract. The contract is the result of consent—of agreement. The changes sought to be engrafted upon this contract are simply sought to be engrafted by power, by force, by command, by compulsion, not only without agreement, not only without consent, but against consent.

Now, then, as to the changes, let us see what they are, definitely and distinctly. First, by section first, Congress simply legislates a meaning that shall hereafter apply to the term "net earnings." All we have to say about that is that it is a well established rule of interpretation that the meaning of words placed in a contract is to be determined by the law at the time the contract was made. What "net earnings" mean was a question of judicial interpretation according to the law as it existed at the time the contract was made. Certainly Congress cannot, by legislation, interpolate another meaning; because another definition established by legislation subsequently to the making of the contract could not have been in the minds of the par-

ties at the time the contract was made. So Congress in that has performed a judicial function, and a very dangerous one, because, if Congress is to define, instead of leaving the judiciary to interpret the meaning, according to the established rules, of the words "net earnings," then Congress, by definition, could make the words "net earnings" mean anything they pleased. Congress could declare that "net earnings" should mean gross earnings, and if the discretion of Congress is the only rule, according to the learned gentlemen on the other side, you cannot question it. I pass by that.

The second change is this: section second declares:

"That the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the Government shall be retained by the United States."

The contract specified that "*only* one-half" of that compensation should be retained. That is certainly a change in the terms of payment.

Another change is this: section third establishes a sinking fund in the treasury of the creditor, equivalent to a sinking fund in the pocket of the creditor.

Mr. Justice HARLAN. Would the act have been liable to the same objection if the sinking fund had been established in the treasury of the debtor?

Mr. HILL. By the Government? Yes, sir; the same principle would apply. I do not think that under the terms of the contract the Government has a right to establish a sinking fund anywhere. May it please your honors, who ever heard of a right of a creditor or of the legislative power to establish a sinking fund as against a debtor who is not in default in a single particular in relation to the payment of the debt? When was it ever done?

No fraud has been committed, no lessening of the value of the property which is dedicated as the security for this

debt, no default in a single payment that has ever become due. Upon a bare apprehension the Government says "we will establish a sinking fund, into which you shall pay certain amounts which are not due, because we apprehend you may not be able to pay the debt when it matures." This apprehension, I wish to remind your Honors, is not justified by a single fact that did not exist with more force at the time the contract was made than now. There is not a man on earth acquainted with the history of this case who will not admit that the probabilities, if there be any such probabilities, of inability to meet the indebtedness of these companies, were greater when the contract was made than now. Every year the roads have increased in value. The whole country has been startled at the fact that the work was done with exceeding rapidity, with a display of energy that nobody anticipated, and it has turned out to be a valuable property. That was not expected. It was certainly beyond expectation.

Now, I put it to you—what fact has transpired since the making of this contract which justifies an apprehension of future insolvency which did not exist in equal, if not in greater, force when the contract was made? Not one. Well, what reason shall be given that there shall be legislative power to establish a sinking fund, and take possession of the administration of the assets of a corporation, or of a debtor, who has never defaulted in a single payment, who is not charged with committing any fraud against his creditor, who is not lessening the value of the property, and who has done no act to create or to justify an apprehension which did not more reasonably exist when the contract was made than when the sinking fund is sought to be established? And yet when this contract was being made it was in the power of the United States to have provided in the contract that a sinking fund should be established. It was not established. On the contrary, the very specific manner in which the terms of payment are set forth in the contract, and the

amount of payment that shall be required in advance, and the evident meaning of the whole legislation and of the contract, that all above those payments, whatever it might be, should be at the absolute disposal of the debtors during the thirty years before the maturity of the bonds, shows a negative upon any such intention of establishing a sinking fund. Congress is thus, upon a mere apprehension, establishing a sinking fund which was not provided for in the contract, and when not a single new fact has been developed to justify Congress in doing now, by legislative power, what it did not originally require by consent and agreement in the making of the contract, and which every line of the contract shows there was no intention to require.

Still another change. It is required that in addition to the half transportation which, under the contract, went to the companies and which is now to be paid into the sinking fund by this bill, the companies shall also pay a fixed sum—the Central Pacific $1,200,000 annually, or so much thereof as shall be necessary when added to the transportation and the five per cent. upon the net earnings, to amount to twenty-five per cent. of the whole net earnings. That $1,200,000 that is now required to be paid into the sinking fund was not required by the contract. There is a change, a material change, both as to the terms and the time and the manner of payment; and if Congress has power to require the payment of $1,200,000, may it not require the payment of five millions—of ten millions—of the whole amount? I am debating this as a question of power. Gentlemen say to have required more would have been unreasonable. Congress can have no right to do even a reasonable thing unconstitutionally. Let us hope that this tribunal will never measure the powers of legislation by what Congress may deem to be reasonable. When you do you abolish all the specific powers in the constitutional grant of legislation to Congress and establish in lieu of all one grand power—the opinion of Congress as to what is reasonable!

The question is not whether it would be reasonable for these companies to consent to the changes sought to be engrafted on the contract. They have not been asked to consent. The question is, has Congress the power to enforce the changes? If Congress has the right to force and compel the payment of one dollar more than was specifically agreed, then Congress will have the right to force, to compel, the payment of every dollar, and that presently and without reference to the time given by the contract. The real truth is, the great purpose of this act of 1878 is not to secure or collect the debt, but to assert power—to make a case to test the power of Congress over the contract.

I am hurrying, but I am trying to get the facts of the changes distinctly before your honors. There is another change made legislatively, and I cannot think of the idea of *legislating* a change without finding my mind shocked. A change in a contract legislated! And yet here is another change sought to be legislated into an agreement, nay, into a mortgage! By the original contract there is a stipulation which I will read to your honors:

"And to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and their delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued."

There is the mortgage lien established by the contract when this legislation was accepted and carried out and executed. That became a mortgage by the consent of the company, and its terms are specific and fixed. Now, by this act—let me read you the new mortgage that is legislated upon the companies, and a very different one it is. I read from section 9 of the act of 1878:

"That all sums due to the United States from any of said companies respectively, whether payable presently or not, and all sums required to be paid to the United States or in the Treasury, or into said sinking fund, under this act, or under the acts hereinbefore referred to, or otherwise—"

That is every sum due, in any manner or form, to the United States—

"are hereby declared to be a lien upon all the property, estate, rights, and franchises of every description granted or conveyed by the United States, to any of said companies respectively or jointly, and also upon all the estate and property, real, personal and mixed, assets *and income* of the said several railroad companies respectively *from whatever source derived*, subject to any lawfully prior and paramount mortgage, lien, or claim thereon."

Now, to specify nothing else, and there are other things included in this broad mortgage not included in the first, I call your honors' attention to the fact that here is an attempt to legislate the mortgage lien upon all the *income* of these companies, from whatever source derived, in favor of this one creditor. Will your honors tell me where is the power to make a mortgage by act of Congress? If Congress could extend the lien of this mortgage by legislation only to the income, could not Congress have made the original mortgage by legislation only and without the consent of the companies? Why not? That is to say a mortgage can be made by legislation only!

But, again, your honors will note that the lien here created upon all this property, including the income, is subject to any other lawfully acquired lien in favor of any other debt; but, as to the *income*, *there is no lien in favor of any other debt.* There is no lien upon this income in favor of the first mortgage bonds. They have the same lien that the United States have except that it is a first lien. Now, when the United States, this creditor, by its own act, by its legis-

lative will and power, establishes a lien upon all the income of these companies, it has a lien that nobody else has, and it is an absorbing, overwhelming lien, and if it be a valid legal lien which the courts will enforce, it puts these companies in the power of this creditor completely.

What is the value of this property except in its income? It is a curious method by which Congress can get possession of the whole thing to the exclusion of the first mortgage. Out of what must the interest on the first mortgage bonds be paid unless out of the income? Will you compel the *corpus* to be sold to pay the interest on the first mortgage bonds, on which alone the first mortgage has a lien? Do you not perceive that when Congress can legislate a lien on all the income of these companies, from whatever source derived, in favor of the United States, and the United States alone, and there is no prior lien upon that income, it puts the whole income in the power of the Government; and if the companies can distribute one dollar of that income after this lien is established, either in the payment of interest on other debts or in the payment of dividends, it will be by permission of this one creditor and not by right? If you establish the doctrine that Congress has power, by its own act, to fix a lien upon all the income of these companies, then, of course, the Attorney General, as it is made his duty in the very next section, may, at any time, take any steps to prevent any disposition of that income by the companies which would prevent or endanger its application to the debt for which it is a lien.

Mr. Justice HARLAN. What force do you give the words "subject to any lawfully prior and paramount mortgage, lien, or claim thereon"?

Mr. HILL. But as to the income there is no prior lien. That is the point I make. As to the other property mentioned, the road, &c., there is a prior lien; but as to the income there is no prior lien, and if this is to be established as a lien in favor of the United States, then the United

States not only have a first lien upon the income, but the only mortgage lien upon the income, and it is yielding the whole question; it is, in effect, repealing the act of 1864, which subordinates the lien of the United States to the lien of the first mortgage bonds for, passing by the *corpus* where the United States has yielded its lien to the other, it seizes all the income from that *corpus* and takes possession and control of it, and no power on earth can prevent the United States after this from controlling not only twenty-five per cent. of the net earnings but all the income. Nay, more; it is peculiar that this lien, which is thus legislated into this mortgage, is not simply upon the net income, upon the net earnings, but upon all; upon the gross earnings, the gross income from whatever source derived, not income derived from the property which was called into existence by the aid of the United States, but the income that may come in from all other sources, from all branch roads, from the roads that the company has acquired since; for it says now, at the time of the enactment of this clause, and from this time, the United States shall have a lien upon all the income of the *companies*, *from whatever source derived*, and it is "made the duty of the Attorney General of the United 'States to enforce, by proper proceeding against the said "several railroad companies respectively or jointly, or "against either of them, and others, all the rights of the "United States under this act," and under the other acts to which it is claimed to be amendatory; and one of the rights which this act establishes, which it is made the duty of the Attorney General to enforce, is this lien upon the income.

Again, there is a new forfeiture legislated upon this debtor. Now, there is a provision in the act of 1862, and a very proper one, that if the companies shall fail to perform their obligations according to the terms and stipulations there provided, according to the contract, the Government may seize the property, take possession of it. Now,

this act superadds the obligations that I have specified, and then provides:

"That if either of said railroad companies shall fail to perform all and singular the requirements of *this act* and of the acts hereinbefore mentioned, and of any other act relating to said company, to be by it performed, for the period of six months next after such performance may be due, such failure shall operate as a forfeiture of all the rights, privileges, grants and franchises derived or obtained by it from the United States; and it shall be the duty of the Attorney General to cause such forfeiture to be judicially enforced."

There is a new forfeiture legislated.

Mr. Justice HARLAN. To what extent is the lien declared by the 9th section separated from the other provisions of the act establishing the sinking fund? Can they be separated in discussing the constitutional question?

Mr. HILL. Can they be separated from the sinking fund?

Mr. Justice HARLAN. Yes; in other words, may the section establishing the sinking fund be held constitutional and the lien declared by section 9 be held unconstitutional?

Mr. HILL. I think so. I think they are severable, although the object of section 9 is to secure the sinking fund among other things. There is no doubt about that. It is better to secure the sinking fund as well as the whole debt, and all debts due the United States. It is simply an additional security, and a very broad one; greater, in my opinion, than the original security itself. But the act of 1862 was very wisely and properly worded on the question of the reservation of power to alter or amend its provisions. That says:

"And the better to accomplish the object of this act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the

use and benefits of the same for postal, military, and other purposes—Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act."

The act of 1864 simply reserves the right to amend or repeal, of course having the same qualifications and being *in pari materia* with the act of 1862, and evidently having the simple purpose of continuing the reservation there specified. But now turn to section 12 of the act of 1878. That section says:

"That nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said acts hereinbefore mentioned; and this act shall be subject to alteration, amendment, or repeal as, in the opinion of Congress, justice or the public welfare may require."

There is a broad reservation for you! No qualification about that except the undefined and indefinable opinion of Congress as to what is just and for the public welfare. Why, may it please your honors, if Congress had power to pass this act of 1878, Congress has shown us a short road to absolutism. If Congress can take the property of this debtor, who is entitled to the same rights and privileges and protection of any other citizen—if Congress can take the property of the citizen and fix new liens upon it and new obligations upon it, and compel the performance of those obligations by force and command, contrary to the stipulations of the contract—pray tell me what is it that Congress cannot do? It would puzzle the ingenuity of any man to find something Congress cannot do. And yet this is not the end of the remarkable changes made, for by section 6 here is another provision, a very remarkable one:

"That no dividend shall be voted, made, or paid for or to any stockholder or stockholders in either of said companies respectively at any time when the said company shall be in default in respect of the payment either of the sums

required as aforesaid to be paid into said sinking fund, or in respect of the payment of the said five per centum of the net earnings, or in respect of interest upon any debt the lien of which, or the debt on which it may accrue, is paramount to that of the United States; and any officer or person who shall vote, declare, make, or pay, and any stockholder of any of said companies who shall receive any such dividend contrary to the provisions of this act, shall be liable to the United States for the amount thereof, which, when recovered, shall be paid into said sinking fund. And every such officer, person, or stockholder who shall knowingly vote, declare, make, or pay any such dividend, contrary to the provisions of this act, shall be deemed *guilty of a misdemeanor*, and, on conviction thereof, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not exceeding one year."

May it please your honors, I wish to speak of this act with the most perfect deference, but in my judgment there is not in the history of legislation such an exercise of absolute power as is contained in that section. You may read every line of the legislation of 1862 and 1864—you may read every line of the history of those times and of the history of the contract—and you will find that it was certainly agreed, as strongly as if distinctly pledged, that when these companies paid five per cent. of their net earnings, and allowed the Government to retain half the sums for transportation for the public, the balance of their net earnings might be distributed in dividends if the companies so chose. Would anybody say anything else?

To make this perfectly clear, section 18 of the act of 1862, provides that whenever this income from the road, after paying all expenses and interest, and excluding the five per cent. upon the net profits, shall exceed ten per centum, then the Government reserves the right to interfere and regulate the rates, if deemed unreasonable—mark you—not to seize the income and compel large payments to the Government on its loan, not to establish a sinking fund, *but to regulate the rates—the manner of exercising the franchise!*

But, I put it to your honors, under the original contract as made, was it not lawful for the companies, having paid all other obligations that were due, to declare dividends? Were not the very sums now required to be paid into a sinking fund intentionally left by the original contract to increase this sum for dividends? No man has said or will say otherwise.

Yet that which was in the contract stipulated a right, a vested right, for which the consideration has been paid; the consideration of constructing one of the most magnificent works of this or any other country; a consideration paid in the form of labor that pierced through and leaped over mountains and overcame every obstacle; a consideration which has given the United States speedy, certain, and cheap transportation, military and postal—a right, secured by such performance, upon such consideration, stipulated by the most solemn agreements—a right, the prospect of the enjoyment of which was one of the inducements to these companies to undertake the performance of this work; that right thus stipulated in the contract—that vested right thus paid for and earned by labor, daring, and enterprise—is denounced in the act of 1878 to be a crime worthy of punishment by enormous fine and imprisonment! Do you say that is constitutional? Will you say that is even reasonable? Can power be more absolute, or wrong more flagrant?

Now, then, let us sum up a little. What does this act of 1878 do as to the terms and stipulations of the contract? It changes the time and the manner of payment and the terms of payment; it changes the lien by which the balance at maturity of the debt is secured; it creates new forfeitures, and converts right into a crime punishable by fine and imprisonment. Is that no change? Is that no impairment of the obligation of the contract? Does it not make a *new* contract? Is it not an entirely *different* contract? And if Congress can legislate a new contract into existence by

changes of an existing contract, why cannot Congress legislate a contract into existence *ab origine?* Why cannot Congress seize upon any corporation or any individual subject to its jurisdiction, and by legislation create obligations in the shape of contracts that the party shall perform out of his own private property, and on failure to perform them be guilty of crime? But the idea that a creditor can do this, the idea that a creditor can get such absolute control of his debtor as to create new obligations against that debtor, contrary to his agreement, without his consent, in the teeth of his contract, to the obliteration of all the inducements originally offered to enter into the contract; that the United States, as a creditor, should thus claim and use its sovereign legislative power over a debtor, is monstrous; and yet this Court is asked to say that Congress can do all these things.

Gentlemen say there is no change in the contract, and they give but one reason for saying it. They say Congress does not require the sums thus seized to be applied to the debt; all the sums so applied *eo nomine* are the five per cent. and half transportation; the balance is paid into a sinking fund. Now, with the profoundest respect for the distinguished gentlemen on the other side, I must say that this position is trifling with common sense. Where is the wrong, if wrong there be in this case? It is in taking the money from the debtor; it is not in the application made by the creditor of it. If the creditor has a right to take the money, he can dispose of it as he pleases. If the creditor has no right to take the money from the debtor, he cannot make a wrongful taking a right by the manner in which the creditor himself chooses to dispose of it after it is taken; and this idea of saying that the debtor cannot complain because although his creditor, by force and power, takes the money from him, yet he does not apply it to his debt, but puts it in a sinking fund, is one of those cases in which they try to change the substance of things by the

words employed. I think really if justice to the debtor had any element in this legislation at all, it would have been much more straightforward and correct, after the United States take this money, to apply it to the extinguishment of the debt, instead of putting it in a sinking fund at an arbitrary rate of interest.

That there is a great change wrought here is shown by the very case before your Honors, for why does this issue come here? Mr. Gallatin, a stockholder in the Central Pacific, files his bill, in which he alleges that the Central Pacific Company are declaring a dividend without providing for the sinking fund required by the act of 1878. There is no allegation that they have not complied with all the terms of the contract as made; no allegation that they are not paying five per cent. of the net earnings; no allegation that they are not allowing the half transportation to be applied to the extinguishment of the debt; no allegation that they are not paying the interest on their other debts; no allegation that they are in default in any respect as to the original contract or to any creditor; but the allegation is that they are paying a dividend without complying with the provisions of the act of 1878, which act they have refused to accept or regard; and this, he alleges, will subject the company to the forfeiture of their franchises and their rights, and subject the stockholders who consent to it to fine and imprisonment, and, therefore he asks that they be enjoined. If the act of 1878 makes no change, why ask that the company be enjoined? The very case made is an illustration of the effect of the changes made by this act of 1878, for no other law, obligation, right, or duty is violated, neglected, or disregarded.

Having stated the terms of the original contract, and shown the changes sought to be legislated into that contract by the act of 1878, I will now discuss the only legal question in the case, and that I will do as briefly as possible.

Has Congress the power to do these things? Has Congress the power to change the terms and stipulations of this contract without the consent of the other party? And where do you get the power? It is alleged here that it exists in two respects. First, that Congress has general power to impair the obligation of contracts. I will say little on that proposition further than once more to express my abhorrence of it. The learned gentleman, ex-Attorney General Williams, read from the Constitution to show that the States are prohibited from passing any *ex post facto* law or law impairing the obligation of contracts, or to create any title of nobility. He then says Congress also is prohibited by another clause of the Constitution from passing any *ex post facto* law, or to create any title of nobility, but there is no inhibition against Congress passing a law to impair the obligation of contracts; therefore, he infers that that is omitted for the express purpose of leaving it to Congress to impair the obligation of contracts!

I am not going to repeat the old maxim that everybody, I guess, understands by this time, that Congress has only delegated powers and such as are necessary to carry out delegated powers. These words, "or to impair the obligation of contracts," were omitted in the prohibitions upon Congress. Why? Because the convention had just given to Congress the power to impair the obligation of contracts. I admit that a certain power to impair the obligation of contracts is in the Constitution, and it would have been wholly inconsistent with that power to put this prohibition in this connection in which the gentleman uses it. What is the power? It is a power to pass "uniform laws on the subject of bankruptcies throughout the United States."

Mr. Justice MILLER. There is no express prohibition upon Congress to impair the obligation of a contract. It would be difficult to conceive in what language anybody would have put such a thing (if it had been intended) into the Constitution. To say that Congress has the power to im-

pair contracts would be to say that it has power to impair all contracts, State and everything else. It would be very difficult to imagine; I do not think you or I could frame any words in which the power to impair contracts could have been given to Congress. You concede, however, that because there is no such provision, it did have power to impair contracts in regard to bankruptcy. Possibly there might be a bankrupt law without impairing the obligation of contracts, but I concede that in its general meaning it does. Does not that same principle apply to all other positive powers that Congress has, where it can legislate on any other subject as well as on bankruptcy, and if that power of legislation finds itself hampered with a contract, can it not in the exercise of its legislative power exercise that power if the necessary consequence shall be to impair a contract?

Mr. HILL. Yes, I ——

Mr. Justice MILLER. As an illustration—I am not supposing, perhaps, that you agree with me about that—as an illustration, take the legal tender law. I suppose it is a fair argument, as this Court has said that the legal tender act was within the power of Congress, I have no hesitation myself in the belief, and I never thought for a moment but that that act impaired the obligation of a contract just as clearly as this one.

Mr. HILL. Certainly.

Mr. Justice MILLER. Therefore is not the doctrine, not that Congress is authorized to impair the obligation of contracts as a distinct power—nobody will contend that—but that wherever it has powers to legislate on a subject and in the appropriate exercise of that power it does impair the obligation of a contract, is that forbidden?

Mr. HILL. I think not.

Mr. Justice MILLER. I think that is the question.

Mr. HILL. I do not think that has anything to do with the present question, for I concede that Congress has the power to pass uniform laws on the subject of bankruptcy

throughout the United States. If the act of 1878, now under consideration, is an exercise of power of that kind, and is intended by Congress to be an exercise of power under that grant of power, and is an act in relation to bankruptcies throughout the United States, it is constitutional. But is it? Can your honors say that this act of 1878 is under that power in the Constitution?

Mr. Justice MILLER. Not under the bankruptcy clause.

Mr. HILL. I should think not. Well, will your honors say that this act of 1878 impairs this contract as an incident to any other power?

Mr. Justice MILLER. That is the point. Is it not an incident to the power of the Government to take care of itself—to collect its debts and pay its debts?

Mr. HILL. That is the very point. The United States have the right to collect and to secure their debts *according to the contract* and through the courts; but neither by the courts nor by Congress have they the right to collect a debt before it is due, nor to seize by force upon additional security, any more than anybody else, because the United States have agreed not to do so, and made that agreement for a consideration which they have received and still retain, and are bound by contracts into which they thus entered just the same as individuals are bound, and must collect debts and enforce contracts just as individuals do. There is not one law of contract for Government and another for individuals.

I grant that Congress can declare war, and war destroys property, war burns cities, war shoots people, and those incidents may result from the exercise of the power to declare war, but Congress cannot, therefore, pass an act that so many citizens shall be shot, and so many houses shall be burned, and so much property shall be destroyed directly. These are unfortunate necessary results or incidents which cannot be avoided and which it would be a crime to do by direct and intentional legislation.

Mr. Justice HARLAN. The argument of the Attorney

General is that this act is the further execution of the power, whatever it was, under which Congress incorporated these companies and authorized the construction of this road.

Mr. HILL. I will come to that, and I will show that it is the weakest ground on which the constitutionality of this act can be placed. The truth is, the act places itself on no such ground. It does not pretend to be in furtherance of a single one of the objects of the acts of 1862 and 1864. It is not in furtherance of the object to construct the road, for that construction is completed; nor of the object to keep up the road, for it is kept up; nor to give the Government the preference in transportation, for that is fully enjoyed. The act of 1878 does not pretend to add to, alter, amend or repeal a single franchise granted the companies; nor to regulate the rates of fare and freights; nor in any manner to interfere with the exercise of a single franchise granted to the corporations. It is an attempt to seize the *fruits* of the franchise after those fruits have become the *vested property of the corporations*. The *income* is not a franchise. The income is *money* made by the *use* of the franchise. If Congress were to regulate or lessen the franchise, by fixing rates or otherwise, the amount of income made might be decreased, but the income when made is not a franchise, but is money, property, absolute property, and cannot be taken "without due process of law." To regulate the franchise is one thing, but to take the money made by the use of the franchise is a very different thing. The money, when made, must be applied to keep up the road and pay the debts *as they become due*, and the balance is *absolute unincumbered property* to its owners, and those owners alone have the right to dispose of it.

But the act of 1878 does not pretend to rest upon any authority except such as may be found in the reservation clauses of the acts of 1862 and 1864. On its face it claims this parentage only. Now let us consider those claims; and first let us strike out all qualifications and consider

them as unrestricted. Thus, "Congress may, at any time add to, alter, amend or repeal this act."

1. The power here reserved is only *legislative power;* but the power to *change* or *rescind* an executed contract is not a *legislative power.* It does not become legislative because the contract sought to be changed or rescinded was executed under the authority of the act. The act may be amended or repealed, but the loan would still remain a valid contract in full force; and so the loan may be paid or the contract rescinded without amending or repealing the act. A power to amend or repeal a legislative act does not, in any sense, even resemble the power to change or rescind a contract.

2. The United States as a creditor does not retain its relationship as a sovereign towards its debtor. It is a civil corporation, and bound by its contracts like an individual. So that even if Congress had the power by general legislation to impair the private contracts of citizens, it would not follow that the United States could release itself from its own obligations, or in any degree impair its obligations. It certainly could not *release itself and hold the other party to the contract.* It could not change its *obligations* and hold its *rights* unchanged. It cannot bind itself as a *civil corporation*, and loose itself by its sovereign *legislative power.*

One of the greatest minds ever produced in this or any other country has most aptly expressed the great truth I am endeavoring to present. In his report to Congress on the public credit, in 1795, Alexander Hamilton uses the following words:

"When a government enters into contract with an individual, it deposes as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly

considered as excepted out of its *power to legislate*, unless in aid of them. It is, in theory, impossible to reconcile the two ideas of a *promise which obliges* with a power to *make a law which can vary the effect of it.*"

The italics are Mr. Hamilton's.

(*Hamilton's Works, vol.* 3, *pp.* 518, 519.)

And I say he is clearly right. It is impossible to reconcile the two ideas, that the United States, in entering into this simple commercial contract, made a promise which obliges the United States, which creates an obligation upon the United States, with a power reserved in the United States to legislate to destroy the effect of that promise. And Mr. Hamilton, in this very report, carried this doctrine to the extent of denying to the Government the power to tax its own promises, because, he said, that impaired the obligation of contracts.

I say, then, that this reservation here is to *Congress.* What can Congress do? Congress is a legislative body. The power reserved, therefore, is a legislative power. A legislative power to do what? A legislative power to change, to alter, amend, or repeal *this act.* Not a power to change the contract, not a power to destroy its obligation, not a power to nullify the terms and stipulations of a contract which obliges it; for if you hold that the United States can by legislative power destroy its contract obligations, the obligation of its promise, you hold that the United States cannot be bound—you hold that the United States cannot be obligated; and if you hold that the United States cannot be obligated by a contract you hold that the United States cannot make a contract. For what is a contract without obligation? What is a contract without mutual obligation? If a contract is not of obligation, and if its obligations are not mutual, it is no contract. How, then, can a contract oblige the United States and at the same time the United States not be obliged, but has the power to change it of its own will—its own arbitrary will—and

without the consent of the other party? Even if the United States can change or lessen its own obligations, how can it *add to the obligations* of the other party? How can the other party be held by any court of justice or law to be bound by terms and conditions in a contract it never agreed to? Can legislative power *force consent* and make contract obligations against consent?

Mr. Justice CLIFFORD. Excuse me. Suppose the original act had contained this requirement for the sinking fund.

Mr. HILL. Certainly, it could have contained it.

Mr. Justice CLIFFORD. Might it not then reserve the power to add it afterwards?

Mr. HILL. By no means, under a reservation of legislative power. If it had been put in the first act it would have been a matter of agreement. It was not put in; therefore, it has never received the assent of the other party; therefore, it is not a part of the contract, and to put it in without agreement and without consent is to destroy the contract.

In the original act the mortgage lien could have been extended to the income, but it was not done. Can the lien be so extended now by legislative will alone? The other parties might not have agreed to such provisions. Can they be forced to agree now? Everything by consent, nothing by force, is the law of contract.

It will not do to say that Congress can now, after the contract has been executed, put in the contract by legislation anything it could have put in the proposition for a contract. It cannot do so under the reservation, because that reservation, as I am showing, is of legislative power to "add to, alter, or repeal *the act*," not to add to, alter, or rescind *the contract* after that contract had been executed, and all its conditions performed, all consideration had passed, and all its rights and obligations became vested and fixed. I agree that this act of 1878 might have proposed changes in the contract so as to establish a sinking fund, and if accepted by the companies it would have been good. But it would

seem its framers put in new forfeitures and created unheard of crimes, as if to prevent its acceptance.

And, may it please your Honors, reason upon this very thing as you may, whenever you hold that Congress, either by virtue of original power or by any reservation of power, can, by legislation destroy or change the contract obligations of the Government, you hold that the United States cannot be bound by a contract, and you hold therefore that the United States cannot make a contract. Idiots, lunatics and minors cannot make contracts, because they have not capacity to consent and be bound. The United States is neither an idiot, a lunatic, nor a minor. It has capacity to be bound; and in order that it may be bound, it does not contract as a sovereign power. Mr. Hamilton says it contracts as a moral agent. Mr. Justice Grier says, with more propriety, that it contracts as a civil corporation; but in either case it abdicates its sovereign power to legislate upon the contract.

A contract is a thing of agreement, a thing of consent. Legislation is a thing of power, a thing of force, a thing of command. Therefore, I say that in this reservation, even if it had been sweeping, general, and unqualified, it refers to that which is legislative in its nature. The act is an act of legislation. Congress can repeal any act it passes; but when Congress repeals this act, mark you, it does not change the terms and stipulation of the contract which has been entered into by authority of the act. Can Congress change its contract by repealing this act? To put this case in the strongest light possible, suppose Congress exerted the greatest power given by that reservation, and repealed the act absolutely and unconditionally, would that repeal annul the contract of loan that was made, or change the terms of repayment, or any of the rights and obligations of the parties to the contract of loan?

Mr. Justice BRADLEY. I think I can suggest a stronger case than that. Suppose Congress should pass a law declar-

ing that the railroad company should not have the lands for ten miles on each side of the road, which had been promised by the original act, would not that be a stronger case?

Mr. HILL. Yes, sir; and the same, I think. I think the rights of the companies to these bonds, and the right of the companies under this contract to the thirty years' indulgence to repay these bonds, are just as much vested rights as the right to those lands. One is just as much property as the other; and, as your Honor says, if Congress can change the vested rights in this contract, can say that the companies shall not have the benefit of the thirty years, Congress can say that the companies shall not have those lands. What is this indulgence of thirty years but a sort of leasehold upon the money? Suppose that Congress, instead of granting the title in fee to those lands, had given the companies a leasehold for thirty years, could Congress disturb that leasehold of thirty years? Could Congress seize the rents, issues, and profits upon that view? Not at all. What is the difference? Congress has given an absolute title to these companies to use this money without repayment for thirty years, and they have paid the consideration for that—a great consideration. Now, Congress can destroy the one as well as the other. Then, I say, suppose Congress should repeal this act entirely, would that rescind any part of the contract, would it change any of the rights under the contract, would it restore the lands to the United States? May it please your Honors, I will use a stronger expression. Congress can no more, by repealing this act, undo the rights of these parties in this contract than Congress can by repealing this act, fill up the cuts, and level the embankments of this railroad, and send the iron on the track back to its home in the unmined earth.

Another point I give you to show that this reservation has no application whatever to this simple contract. You cannot apply words to a subject-matter to which the words are not properly applicable, especially when there is matter

in the same connection to which they are applicable. We all know the history of this reservation clause. What is it intended for? It is intended to apply to franchises; it is intended to apply to grants of charters. That is where it originated, and it has never been used in any other connection. There are certain franchises granted by the act of 1862, and by this legislation Congress in reserving that power intended it should apply to those things. But the learned Attorney General says that by this reservation Congress has retained a supervision over the railroad companies. Grant it; but over the railroad companies how? Over them in the exercise of their franchises. That does not give the United States, as a creditor, supervisory power over its debtor. That does not give Congress the right to change the terms of this contract of loan with the debtor. That does not give to Congress the right to say that a debt which it agreed should not be due until thirty years should be due now.

But, may it please your honors, why discuss this proposition? If this clause had been broad and general, I have shown it could not apply to the contract, because the contract is not a subject of legislation. It is a subject of consent. It is born not of legislation; it is born of consent, and nothing can change a contract except that which makes it—consent. Then, again, I say that you cannot apply those words to the contract, because there are subjects in the act which are legislative and to which the words do properly apply, namely, the franchise and the use of the franchise, and I should have applied them in that way without any qualification. But why take up the time of this Court to discuss a question which the language of the act of 1862 should settle? Every inference that this reservation of power could apply to the contract and to the terms and stipulations of the contract is negatived by the very language of the act of 1862. Read it again. It has been read a hundred times, but it will bear reading again: "And the

better to accomplish the *objects* of this act" Congress reserves the right to alter and amend, &c. Suppose that was all. Would you say that gave to Congress a right to alter and amend the contract of loan? Did Congress pass this act in order to get a chance to lend money? Was that the *object* of the act? Congress does not leave us to inference. It goes on:

"And the better to accomplish the objects of this act—namely, to promote the *public interest and welfare.*"

Not to change a contract, not to give the creditor supervising power over his debtor, as a debtor; not to make that which is agreed now to be legal a crime hereafter; not to denounce new forfeitures, but "to *promote the public interest and welfare.*" This is another qualification. The first qualification is that it is confined to the *objects* of the act; the second is to promote the public welfare. But how? Here comes another limitation: "by the construction of "said railroad and telegraph line, and keeping the same in "working order, and to secure to the Government at all "times (but particularly in time of war) the use and benefits "of the same for postal, military, and other purposes," Congress reserves the power to alter or amend or repeal the act, &c.

Can anything be plainer than that? Now, put yourselves back, just for a moment, in the condition of the country and in the condition of Congress, when that legislation was enacted. The road was not built. It was deemed by many of the best minds in this country to be almost an impossibility that it should be built. It was looked upon as a utopian enterprise that could not be accomplished. Therefore, thinking that one party might attempt it and fail, and that another party might be necessary, Congress determined to keep control over the great object of building the road, and to keep legislative control. That was a subject of legislation, and the franchises granted the companies were the

subject of legislation. And the right of the United States to have transportation is a subject of legislation, and the keeping up of the road is a subject of legislation, because they are all franchises. Congress says, "for the purposes o the object of this act, that is to promote the public welfare by constructing this road and keeping it in working order, and securing the United States the benefit of this transportation, this power is reserved." And yet, with this plain provision in the act, as plain as you could write it now, volumes almost have been uttered to show that this reservation applied to a simple commercial contract. Why, may it please your honors, the nature of the subject, the use of the words, the history of these words of reservation, and the qualifications fixed upon their use by the very act of Congress itself, show that it was never intended that they should give Congress a power over the contract, but solely over that which was the franchise and "subject of legislation."

Take any view, therefore, and this reservation has no relevancy whatever to this contract of loan. Now, for a moment, in this connection, I wish to make a remark in relation to the authorities which were classified with a great deal of learning and ability by the Honorable Attorney General in his argument on what he considered cases analogous to this act of 1878. Those cases, every one of them, illustrate the distinction I am trying to draw before your honors.

The first case he gives us, (if I recollect it, for I have not time now to look at all the cases,) is the one where the legislature of Massachusetts had authorized a ferry company, to charge three cents ferriage, and under the general reservation in the general law of Massachusetts to alter or amend, the legislature afterwards reduced it to two cents. There is no trouble about that. That right to charge ferriage was not paid for by a consideration like this; it was a grant of

a franchise, and the subject of legislation. It is not like a simple commercial contract.

So take another case: He referred to a case where a railroad company had been compelled to extend its line. Certainly the extension was part of its franchise. The duty of serving the public was the object of creating that franchise, and if the extension was required in the service of the public it was in the power of the legislature to so legislate. There is no trouble about that.

So with another class, that of insurance companies, who are required to increase their capital by legislative act. Insurance companies were incorporated and their capital fixed at a certain amount, and, subsequently, the Legislature passed an act requiring an increase of that capital. That is legitimate and proper. What is the francnise of an insurance company but to take risks, and the Legislature which grants the franchise is bound to require ample security for the persons who take policies in that company; and if the first provision is not ample for the original purpose, it is the duty of the Legislature to increase the security. And, take the language he quotes from Mr. Justice Clifford, I believe in the Holyoke case, where Mr. Justice Clifford says the power under this reservation is almost without limit. Over what? The power under this reservation is almost without limit, I repeat, over what? Over "the objects ot the grant—over the franchises of the company." Not over commercial contracts, not over contracts to which the Government is a party as a civil corporation, and, in entering into which, it deposed its constitutional legislative power in order to become obligated as a party to a commercial contract.

Then, one more case, the tax case. The Attorney General says the Legislature has incorporated railroad companies, and agreed that, in consideration that the companies would build those railroads, they should be free from taxation, and that, under a general reservation to alter or

amend as here, subsequent Legislatures have taxed those companies. That is all legitimate and proper. Why? Simply because the taxing power is a legislative power, and when the parties accepted an act exempting them from taxation, they accepted it with a distinct knowledge that the right to tax was a legislative power; and, under the reservation, might be resumed at any time. It is questionable in my mind whether the power to tax could not be resumed any time without the reservation, because the power to tax is a legislative power; and it is questionable whether one legislature can deprive other legislatures of the right to exert that power for the preservation of the country and the raising of revenue to support the Government.

Take every case that has been presented, and I assert here broadly that there is not a case to be found on record where this power reserved was ever exercised to change the terms and stipulations of a mere commercial contract, in which commercial contract there is no element of franchise and no subject of legislative power, and in its nature necessarily so, because, as I said, a contract is necessarily a thing of consent; it is not the creature of legislative power. Legislation can *authorize* a contract to be made, and can furnish *remedies* for its enforcement; but legislation cannot *make* a contract; legislation cannot *change* a contract; legislation cannot *annul* a contract. Contracts are made, contracts are changed, contracts are discharged, by the consent of the parties to them, and they are enforced by the courts. Power is the vital element of legislation. Consent is the central and vital element of contracts; and the idea of legislating a contract, the idea of legislating a change in a contract, is exceedingly absurd, with all deference to the learned gentlemen.

I have thus shown that this reservation in its very terms is legislative; that it does not apply to a contract, and then, by the qualifications in the reservation itself, it applies only to the franchise and the original objects of the grant; and

then I have shown that every case referred to by the Attorney General is a case where the reservation has reference to subjects of legislation.

It is a pleasure to discuss a purely constitutional question like this before a tribunal which, in fact and in the theory of our Government, is placed far above the high-water mark of that turbid stream, so full of engulfing whirlpools and noisy cataracts, known as the current of popular caprice. We are fond of believing that the system of government under which we live is the grandest achievement of human effort. Its division of government into local and general; its division of the functions of government, both local and general, into different departments, are the products of long experience and unsurpassed wisdom. That feature in this system which makes it the duty of the judiciary to review the actions of all other departments, and to keep all within their respective constitutional limitations, is most beneficent and salutary. In England there is no redress against an act of Parliament, however oppressive, but repeal or revolution.

But nine men sitting here can say to the ambassadors of thirty-eight States and the representatives of forty-five millions of people, "what you do is a nullity." Nine men sitting here can say to the Chief Executive of this great nation, whom armies and navies must obey without a question, "stop;" and his authority ceases. Why? Why all this machinery of government? Why this revisory tribunal placed above the ordinary temptations that beset mortals? It is not to exalt your honors. You are but as other men. You walk, and talk, and sleep, and wake, and eat, and drink as the others of us. Ah! may it please your honors, all this is for one grand and glorious purpose, and it is that the citizen shall have protection against the exercise of arbitrary and unconstitutional power! It is that every citizen, the humblest equally with the proudest, shall enjoy his

personal liberty, his personal security, and his private property.

Contracts are property, but without inviolability they are property without value. Without inviolability in contracts no other property is secure, for all property is the creature of contract. This is the first case in our history in which the proposition has been boldly made that the Government, itself a party to a contract, can, by legislation alone, constitutionally change the terms and stipulations of the contract and destroy its obligation without the consent of the other party.

May it please your honors, when you shall hold that the Government cannot be bound by its contracts you will do more to destroy its credit than anything that can happen. I pray you do not open to the minds of the people the idea that through legislation in Congress they can annul the contracts of this Government. When you do that, you do more to undermine the foundations of society, more to destroy the hopes of the perpetuation of popular Government, than armies could accomplish.

Hold all persons, governments, corporations, and individuals to their contracts as they make them; bind nobody, government, corporation, or individual, to contracts they have not made. That is the only rule of honesty, the sure rule of law, and the inevitable rule of right.

March 19. 79. arg'd N. H. Storrs

SUPREME COURT OF THE UNITED STATES.

No. 972.

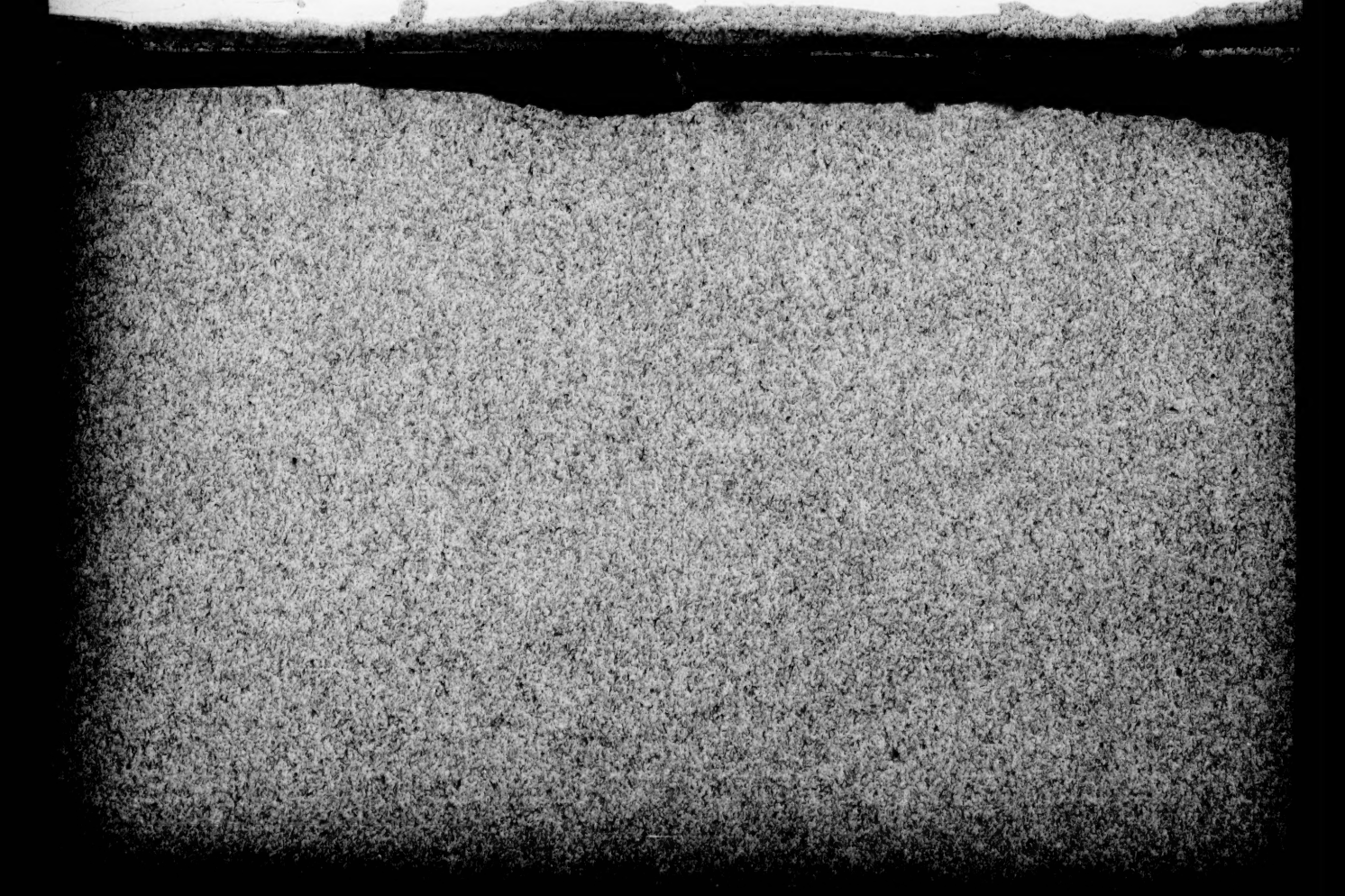
THE CENTRAL PACIFIC RAILROAD COMPANY,
LELAND STANFORD AND OTHERS,
Appellants,

vs.

ALBERT GALLATIN,
Appellee.

BRIEF.

JAMES H. STORRS,
For Appellants.



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No. 972.

CASE.

This suit was brought in the Circuit Court of the United States, for the District of California, by a stockholder of the Central Pacific Railroad Company, against that company and its Directors, to compel a compliance with the provisions of an act of Congress, entitled

"An Act to alter and amend the act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act."

(Approved, May 7, 1878.)

The complainant below, Albert Gallatin, filed his bill in equity, alleging that he is and long has been a stockholder of the Central Pacific Railroad Company, and that he brings his bill as well in his own behalf, as in behalf of all other stockholders of the Central Pacific Railroad Company who should elect to join in the prosecution of the suit, and contribute to the expenses thereof (*page* 13 *of Record*).

The bill avers that the Central Pacific Railroad Company of California was duly organized and incorporated as a railroad corporation on or about the 28th day of June, 1861, under the laws of the State of California, for the purpose of constructing and operating a railroad from the City of Sacramento to the eastern boundary of the State, and that it continued to exist until, by consolidation, it became merged into andwas succeeded by a certain other corporation, with enlarged powers, under the name of the Central Pacific Railroad Company. It then sets out the grants, rights and privileges made to the said Central Pacific Railroad Company of California by the act of Congress of the United States, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, 1862, and that the company accepted the provisions of the act in the manner required by the act. The bill then sets out the provisions of an act of Congress, approved July 2, 1864, amending said Act of July 1, 1862, which contained certain modifications of the Act of July 1, 1862, and that the company assented to the act and proceeded with the construction of its railroad eastward to a connection with the Union Pacific Railroad in the Territory of Utah. That in such construction it used and availed itself of the right of way granted by said acts, and received patents for lands granted by said acts, and the loan of certain bonds issued by the Government, and issued its own first mortgage bonds to an amount equal to said Government bonds. The bill also sets out the consolidation of the first named corporation with the Western Pacific Railroad Company on the 21st day of June, 1870, under the name of the Central Pacific Railroad Company, and the consolidation of the latter on the 20th day of August, 1870, with the California and Oregon Railroad Company and certain other corporations, created under the laws of California, under the name of the Central Pacific Railroad Company, and that said consolidations were effected and a new corporation formed under the laws of California, and that said cor-

poration controls and operates a railroad and telegraph line from the Pacific coast at or near San Francisco eastwardly through and across the States of California and Nevada to Ogden, in Utah, forming, with the railroad and telegraph line of the Union Pacific Railroad Company, a continuous line from the Missouri river to the Pacific Ocean, and that the company owns large quantities of land patented under the acts of Congress.

The bill sets out most of the provisions of the Act of Congress, approved May 7th, 1878, first above referred to, commonly known as the "Thurman Act," and gives the names of the other defendants, who constitute the Board of Directors, and that said defendants allege, pretend and declare that said last mentioned Act is not, in any just sense, an amendment of the Acts of 1862 and 1864, but is in direct violation of the contract existing between the Government of the United States and the corporation, under the Acts of 1862 and 1864, and each of them, and that it impairs the obligation of said contract, and that said Act of May 7, 1878, is unconstitutional and void, and is not binding upon the defendants, or any of them, and that they further pretend, give out, and allege, that said last mentioned act impairs the obligation of the contract existing between said corporation and the Government of the United States in this that it requires said company to pay to the United States large sums of money many years in advance of the time at which the same would become due under said contract, and that in other and various respects said act is violation of the Constitution of the United States, and that the same is wholly void. That the defendants, acting under the color and pretense aforesaid, further threaten and declare that they will not, nor will either of them, nor will said corporation in any way or at all, conform to obey or be governed by or carry out or accept, recognize, perform or comply with said act or any of the terms or requirements thereof, and especially that said company will not pay into the Treasury to the credit of the sinking fund created by said act any of the moneys thereby required to be paid by said company thereto, but that they and each of them, and said

corporation shall and will at all times oppose, contest withstand, disregard and refuse to perform or comply with each, every and all the requirements, terms and provisions of said act. That since the passage of the said act of Congress the Directors of the company at a meeting duly held, have resolved that the company would not comply with said act of Congress, nor pay into the sinking fund the money required by the provisions of the act, but that the company and its officers and Directors would resist and contest all proceedings to compel compliance therewith, or to enforce the penalties or forfeitures provided in said act.

That the company being in default in payment of five per cent. of net earnings required by the act, and having failed to pay the same, the Directors thereof, since the passage of the Act of May 7, 1878, to wit, on the 28th day of August, 1878, with knowledge of the facts, and in defiance of the requirements of the act, have, at a meeting of the Board, acting for and in the name of the corporation, voted, made, declared, and directed payment of a dividend to the stockholders of the company out of the earnings of the company made and accumulated since the 30th day of June, 1875, of one per cent. of and upon the capital stock of said corporation.

That the company has not sufficient money or funds to pay said dividend so declared and directed to be paid and provide for the maintenance and current expenses of its railroad and telegraph line, and enable it to reserve and accumulate a sufficient amount on and before the first day of February, 1879, or within six months next thereafter, to meet the requirements of said Act of May 7th, 1878, and that the payment of such a dividend would exhaust all the moneys in the treasury of the company, and render it utterly unable to comply with the provisions and requirements of said act. That unless restrained by the court, the defendants will pay the dividend so declared, and will put it out of their power to comply with the provisions of the act, or to pay into the Treasury of the United States the moneys required by the act to be paid, and will wilfully and intentionally cause said company to fail to perform the require-

ments of the act, for six months next after such performance shall be due from the company, which failure to perform it is declared by the terms of the act shall and will operate as a forfeiture of all the rights, privileges, grants and franchises derived or obtained by said company from the United States, and would forfeit to the United States the lands granted and patented to the corporation, and the right of way through and over the public lands, and immediately render said corporation insolvent.

The bill then prays that the company and the Directors may be perpetually enjoined from paying the dividend declared or any dividend, and from doing any act that will tend to jeopardize, imperil or cause a forfeiture of any of the rights, privileges, grants or franchises derived from the United States, and be commanded to perform, obey, carry out, conform to and comply with each and all the requirements and provisions of said act of Congress approved May 7, 1878.

The defendants demurred to the bill, and, upon the cause coming on to be heard, the court overruled the demurrer, and, the defendants declining to answer, decreed that a mandatory injunction issue against the defendants.

The defendants appeal to this court.

Assignment of Errors.

The Circuit Court erred in overruling the demurrer and decreeing an injunction.

POINTS.

We ask the court, to bear in mind the following suggestions, in examining this case:

I.—The condition of the country and the circumstances under which the Acts of 1862 and 1864 were passed, and the reasons which induced their passage.

II.—That the Central Pacific Railroad Company of California was not chartered by Congress, but was an existing corporation chartered under the State law of California.

III.—That when the Act of May 7, 1878 (called the Thurman Act), now under consideration, was passed, the company which had received aid in Government bonds was no longer in existence, but had been consolidated, under authority of the State law, with other companies, owning other roads, on which the United States had advanced no bonds, and on which the Government had no lien, and a new company had been formed—the present Central Pacific Railroad Company.

IV.—That by this State law it was under certain obligations with which it was bound to comply, one of which was, that on issuing its bonds and securing the same by mortgage, the directors should provide a Sinking Fund, to be specially applied to the redemption of such bonds on or before their maturity (*See General Railroad Law of California, approved May* 20, 1861, § 15 *in General Laws of Cal., Par.* 840).

V.—That the acts of Congress of 1862 and 1864 were not charters of the company or passed solely for its benefit but merely a business contract founded on mutual considerations, in which the United States laid aside its sovereignty and agreed to do certain things, and the company agreed to do certain other things.

VI.—That the contract was at first executory, but gradually became an executed contract as each twenty miles was built and accepted by the Government, and bonds and patents for lands were issued thereupon. (This court has just decided that the road was completed in 1869). Nearly nine years before the Thurman Act was passed the contract was executed, and the company had acquired certain vested rights thereunder.

VII—That the contract and the power reserved to alter and amend must be construed and interpreted in the sense that they were understood and intended by the parties when the contract was made.

VIII.—That the Thurman Act was passed, not because of any default on the part of the company, for none existed, and it was not pretended that any existed, but to avoid the effect of the decision of this court on the interest question, and to compel payment of the claim of the Government before it is due.

IX.—That it attempts to enforce the payment of the claim out of the earnings of roads on which no Government bonds were advanced, and on which the Government had no lien.

X.—That it seeks to provide a sinking fund and a lien which had not been provided for or agreed to in the original contract.

XI.—That it impairs contracts, destroys vested rights and is unconstitutional and void.

Argument.

The United States, by the Act of Congress of July 1, 1862 (*secs.* 2 *and* 9), granted to the Central Pacific Railroad Company, of California, above mentioned, "a corporation existing under the laws of the State of California" (*sec.* 9):

1st. The right of way two hundred feet wide on each side of its railroad through the public lands of the United States, from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California (*sec.* 9), and, upon certain contingencies, to the Missouri river, or until it should meet and connect with the Union Pacific Railroad (*sec.* 10, *and Act of July* 3, 1866, *sec.* 2).

2d. The United States, by the same act (*July* 1, 1862, *secs.* 3 *and* 9), granted to the Central Pacific Company, "*for the purpose of aiding in* the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon, every alternate section of public land designated by odd numbers, to the amount of *five*" (changed to ten by Act of 1864, section 4), "alternate sections per mile on each side of said railroad, on the line thereof and within the limits of *ten* (changed to twenty by section 4, Act of 1864) miles on each side of said road not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

3d. The United States contracted and agreed that "*for the purposes herein mentioned*" (to aid in the construction of the road), the Secretary of the Treasury should, upon the certificate of the said Commissioners, of the *completion and equipment* of *forty* (changed to twenty by Sec. 10 of Act of 1864) consecutive miles of said railroad and telegraph, in accordance with the provisions of the said act, issue to the company bonds of the United States of one thousand dollars each, *payable in thirty years after date*, bearing six per cent. per annum interest, &c., &c, to the amount of sixteen of said bonds per mile, and for one hundred and fifty miles over the Sierra Nevada Mountains, the bonds to be issued to the Central Pacific Railroad Company were to be *treble* that number, and east thereof to be double that number (*sec.* 11). The issue of the bonds and delivery to the company were *ipso facto* to constitute a first mortgage on the whole line of the railroad and telegraph, and on the rolling stock, fixtures, &c., "*in consideration of which said bonds may be issued.*"

These things are what the United States contracted and agreed with the company to do by the Act of July 1, 1862.

But certain things were required to be done by the company in order to its enjoyment of the grants of the right of way and of the lands, and to entitle it to the benefit of the loan agreed to be made in bonds.

These were *conditions precedent:*

1st. To file its acceptance of the conditions of the act in the Department of the Interior within six months after the passage of the act (*sec.* 9).

2d. To construct the road. The Central Pacific Company was required to complete *fifty* (changed to twenty-five by Act of 1864) miles of its road within two years after filing its assent to the provisions of the act, and fifty (twenty-five) miles per year thereafter, until the whole was completed (*sec.* 10).

3d. It was required, within two years after the passage of the act, to designate the general route of its road, as near as might be, and file a map of the same in the Department of the Interior; whereupon the lands within fifteen (afterwards twenty-five, by Act of 1864) miles of the designated route were to be withdrawn from preëmption, private entry and sale (*sec.* 7).

4th. Whenever the company had completed forty (afterwards, by sec. 6 of Act of 1864, changed to twenty) consecutive miles of its railroad and telegraph line ready for service, as contemplated by the act, and supplied it with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, and had the same examined by Commissioners to be appointed by the President of the United States, and it appeared to him, by the certificate of said Commissioners, that said section of railroad and telegraph line had been completed and equipped in all respects as required by the act, then patents for the lands granted on each side of the road, as far as the same was completed, were to issue (*sec.* 4).

5th. When the company had completed and equipped forty (changed to twenty by Act of 1864) consecutive miles of said railroad and telegraph, in accordance with the pro-

visions of the act, and the Government Commissioners had so certified, then, and not till then, the company was entitled to receive the bonds of the United States above mentioned (*sec. 5*).

Besides those conditions *precedent*, there were certain conditions *subsequent*, which the company was bound to observe, and which are principally found in the sixth section of the Act of 1862:

1st. The company shall pay said bonds at maturity.

2d. Keep the railroad and telegraph line in repair and use.

3d. Transmit dispatches over the telegraph line, and transport mails, troops, munitions of war, supplies and public stores, upon *said railroad*, for the Government, whenever required to do so by any department thereof, at fair and reasonable rates of compensation not to exceed the amounts paid by private parties for the same kind of service.

4th. The Government at all times to have the preference in the use of the same for all the purposes aforesaid.

5th. *All compensation for services rendered for the Government to be applied to the payment of the bonds and interest, until the whole amount is fully paid. [*This was changed to one-half by the Act of 1864, Sec. 5.]

6th. After the road was completed until the bonds and interest were paid at least five per cent of the net earnings of the road were to be annually applied to the payment thereof.

Finding that the provisions of the Act of 1862 were insufficient to secure the building of the road, and that it could not be built unless greater inducements were offered by the

Government than those contained in the Act of 1862, Congress passed the Act of July 2d, 1864, by which certain changes were made. The land grant was doubled (*Sec.* 4). The time of designating the route and filing the map were extended one year. The Central Pacific Company was required to complete twenty-five miles a year, and to the State line within four years (*Sec.* 5) ; allowed bonds and patents for lands to issue when twenty (instead of forty) consecutive miles of road and telegraph were constructed (*Sec.* 6). Repealed a provision for the reservation of certain portions of bonds (*Sec.* 7) ; allowed the issue of bonds on uncompleted work to the extent of two-thirds of the value, (*Sec.* 8); and authorized the company *on completion of each section of its road*, to issue its first mortgage bonds on its railroad and telegraph to an amount not exceeding the amount of the bonds of the United States, to which bonds it subordinated the lien of the United States bonds (*Sec.* 10), and thus made the lien of the United States bonds a second instead of a first lien, except as to the Government despatches and transportation (*Sec.* 10). This was done because it was found that the road could not be built unless more money could be borrowed than could be obtained on the Government bonds, and capitalists would not invest in the bonds of the company secured by mortgage with a lien second to that of the Government. As a further inducement to the company to proceed with the work and to capitalists to invest in the first mortgage bonds, and to insure the payment of the interest on those bonds, the Act of 1862 was further amended so that "only one-half of the compensation for services rendered for the Government by said company shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads" (*Sec.* 5).

It is only necessary to recount these various amendments to be satisfied of the anxiety on the part of the Government that the Pacific railroad should be built; and while the Government thus modified the provisions of the Act of 1862 it did not entirely remove any of the above conditions,

excepting the provision in section 17 of said Act of 1862 requiring a certain portion of the bonds to be reserved until the completion of the whole road. This provision was repealed by the Act of 1864.

Every point was guarded with exceeding care, as much so as could be possible in any contract between private persons, and there were sufficient mutual considerations to support the contract. In addition to the various conditions precedent and subsequent above referred to and to the remedies which the Government would have in the courts of law and equity in case the company did not perform its part of the agreement, the contract was guarded by stringent penalties, as for instance, in the 17th section of the Act of 1862, it is provided,

"That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road, telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished, or out of repair and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States to repay all such expenditures caused by the default and neglect of such company or companies."

"Provided, That if said roads are not completed so as to form a continuous line of railroad ready for use, from the Missouri river to the navigable waters of the Sacramento river in California, by the first day of July, 1876, the whole of all said railroads before mentioned, and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements and hereditaments, and property of every kind and character shall *be forfeited*, and be taken possession of by the United States."

This clause of forfeiture was so modified by the Act of 1864 (Sec. 7), that the failure of one company to comply with the conditions of the acts should not work a forfeiture of the rights, privileges and franchises of any other company that shall have complied with the same.

Another instance of penalty in case of failure to pay the bonds is the following;

"And on the refusal or failure of the said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States."

We say, therefore, that the acts, upon their face, bear conclusive evidence that their provisions, so far as the Government and the Central Pacific Company were concerned, constituted a business contract, and not merely a charter contract —a contract which contained mutual considerations—a contract which the United States considered of great advantage to it to make, and one which was unalterable, except by mutual consent, to the extent that it had been performed by either, and that rights had been acquired and become vested by reason of such performance.

That even under the broadest power reserved under either act to alter, amend or repeal, and assented to by the company, no alteration or amendment can be made by Congress which, in the slightest degree, deprives the company of any right which had become vested in the company, or any property right which it had acquired by the construction of the road in conformity with the act.

That to authorize Congress to pass any act under such power reserved, it must be shown that the company has made default in some of the provisions of the acts, and the act so passed must be enacted with reference to and to meet such default only.

It is unnecessary to discuss at length several questions which otherwise would arise, as this court seems to have disposed of them in recent decisions.

In the case of the United States, appellants, *vs.* the Union Pacific Railroad Company (commonly known as the Credit

Mobilier suit), at the present term, this court decided as appears from the syllabus, that,

"The United States has two distinct relations to the Union Pacific Railroad Company, namely the *legislative* and visitorial power of a Government *creating the corporation, and the relation growing out of the* CONTRACT *found in the charter and its amendment.*"

"This bill exhibits no right to relief on the part of the United States, founded on *the charter contract.* The company has constructed its road to completion, keeps it in running order, and carries for the Government all that is required of it. It owes the Government nothing that is due, and the government has the security which by law it provided."

Mr. Justice Miller in delivering the opinion of the court, states at length, some principles which we think are decisive of the case now before the court:

"The Government sustains two distinct relations to the railroad company (the Union Pacific), and it is important in considering her rights under this statute to keep them separate. The company is organized under an act of Congress. It owes its corporate existence to that act, and the Government has all the rights which belong to any other Government as a sovereign and legislative power over this creation of that power. That this power should not be too much crippled by the doctrine that a charter is a contract, the 18th section declares that Congress may at any time, having due regard for the rights of the companies named therein, add to, alter, amend, or repeal the act. The power of Congress, therefore, in its sovereign and legislative capacity over this corporation is very great.

"The government, however, holds another very important relation to the company, namely, the relation of *contract*. It has loaned to the company twenty-seven millions of dollars. It has granted to it on certain terms many millions of acres of land. The government is paying all the time the semi-annual interest on its own bonds which it loaned to the company. The company is bound by contract to pay the bonds, principal and interest, at their maturity. The Government by the contract has a lien on the road and its apurtenances to secure this payment. The company is also bound by the contract to perform for the Government all that may be required of it, of transportation and telegraphing, and to keep its road always in order and readiness to do this. There

may be other contract obligations of the company to the Government not here mentioned, but these are all that are important to our inquiry. The Government has delivered its bonds to the company. The company has built the road, owns it and operates it. Is there anything growing out of this contract alleged in the bill for which the United States is entitled to relief?"

"This court decided, at its October Term, 1875, in a suit between the same parties, that the company was not bound to pay this interest until the maturity of the bonds, except so far as the act made two special provisions on that subject. One of them was that half the compensation for transportation performed for the United States should, as provided by the subsequent amended charter of 1864, be withheld by the Government for that purpose. The other was the provision that after the road should be completed five per cent. of the net earnings of the road should be applied annually to extinguish the debt to the United States (91 *U. S. R.*, 72).

The second section of the Act of 1873, as we have seen, provides for the first of these cases; and suits have been brought by the Government, and are now ripe for decision in this court, as to the other.

There is, therefore, no ground for relief on account of money due by defendant to plaintiff.

It is said that the United States, as a creditor whose lien is endangered by the extravagance and misappropriation of means by the company, has a right to come into equity for preventive relief to secure the collection of the sums of which the company has been defrauded.

The Government made its contract and bargained for its security. It had a first lien on the road by the original act of incorporation, which would have made its loan safe in any event. But in its anxiety to secure the construction of the road, an end more important to the Government than to any one else, and still more important to the people whom it represented, it postponed this lien to another mortgage, that the means might be raised to complete it. The Government has the second lien, however, and it has the right to appropriate one-half of the price it pays for the use of the road—a very large sum—annually, and five per cent. of the net earnings of the road, which may become much larger, to the extinction of this debt. It is not wholly unreasonable to suggest that the amount which the company may be compelled to pay annually, under these two proprovisions, will be sufficient as a sinking fund to pay the entire debt, principal and interest, before it falls due.

It is difficult to see any right which the Government has as a creditor to interfere between the corporation and those with whom it deals. It has been careful to look out for itself in making the contract, and it has the right which that contract gives. What more can it ask? It is true that there is an allegation of insolvency. But in what that insolvency consists is not clearly shown. It has a floating debt. What railroad company has not? It is said it does not pay the interest on its debt to the United States. We have shown that it owes the United States no money that is due. There is no allegation that it does not pay the interest on all its own funded debt. The allegation, as it is, would be wholly insufficient to place the corporation in bankruptcy even if that was not forbidden by the act under which this bill is drawn. The facts stated are utterly insufficient to support a creditor's bill by the United States. That requires a judgment at law, an execution issued, and a return of *nulla bona*. Here there is no judgment, no money due, and no sufficient allegation of insolvency.

We are unable, therefore, to see any relief which the United States would be entitled to in a Court of Equity under this bill, on account of its contract relations with the defendant."

If the court came to this conclusion in a case where the United States stood "as the grantor of the franchises of the company," "the author of its charter" and as "*parens patria*" what must be its conclusion in a case which comes up for adjudication with reference to a company deriving its life and charter privileges from another source, as is the case with the Central Pacific Company, and whose whole connection with the Acts of 1862 and 1864 (the acts construed in this case), was one of *contract* with the Government.

Again in the same case the court, speaking of statutes passed to supply defects in remedies for existing rights, says:

"It may be said, and probably with truth, that such statutes, when they have been held to be valid by the courts, *do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power* or to give improved methods of procedure to the courts in dealing with *existing rights*.

This leads to an inquiry indispensable to a sound decision of the case before us, namely, does this statute, by its true construction, do anything more than this? * *

"The first suggestion of the legal mind on this inquiry is that it will not be presumed, unless the language of the statute imperatively requires it, that Congress did intend, by a retrospective law, to create new rights in one party to the suit at the expense, or by invasion of the rights of other parties; that where no right of action against a party existed, Congress intended to create a right of action against that party founded on past transactions."

Another important principle arising in this case has also been recently decided in this court, that

The subsidy bonds having been granted and being a lien on only a portion of the road, the five per cent. of the net earnings is only demandable on the net earnings of that portion.

In the case of the United States *vs.* The Kansas Pacific Railway Company (known as one of the five per cent. cases), Mr. Justice Bradley in delivering the opinion of the court, says:

"From a careful examination of the statutes relating to this subject we are of opinion that whilst as to the entire line the company in the words of the 9th section of the Act of 1864, is 'entitled to all the benefits and subject to all the conditions and restrictions of the act,' * * * "
"yet, that the subsidy bonds granted to the company, being granted only in respect of the original road terminating at the one-hundredth meridian, *are a lien on that portion only, and that the five per cent. of the net earnings is only demandable on the net earnings of that portion.* This deduction we think is clearly demonstrated by the words of the 5th section of the Act of 1862, which creates the Government lien for the payment of the subsidy bonds. Those words are 'that the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph with the rolling stock fixtures, and property of every kind and description [and] *in consideration of which said bonds may be issued.*' It is the road and appurtenances in consideration of which, or in respect of which the bonds are issued, that is subjected to the lien. This can apply in the present case only to the first 394 miles of the defendants' road. And as the lien only applies to this portion, *the stipulation for payment out of net earnings cannot reasonably be applied to any other portion of the line.*"

In the light of these late decisions of this court, and others to be referred to, let us examine some of the provis-

ions of the Acts of 1862 and 1864, with the Thurman Act of May 7, 1878, and see if the provisions of this last Act, or some of them, are not most clearly unconstitutional and void.

This court decided in the United States *vs.* Union Pacific Railroad Company, 91 U. S. R., 72 (*the interest case*), that there was nothing due on the bonds until the maturity of the principal, thirty years from the date of the bonds, except *one-half* of the compensation for Goverment service, and *five per cent.* of the net earnings of the road, after the road was completed.

The last clause of the 6th section of the Act of 1862, provides that—

"After said road is completed, until said bonds and interest are paid, at least *five per centum* of the net earnings of *said road* shall also be annually applied to the payment thereof."

The last clause of the 5th section of the Act of 1864 contains this provision :

"That ONLY ONE-HALF *of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of* SAID ROADS."

This court, in the above cited cases, has decided that these acts of Congress constituted contracts between the Government and the companies, not merely charters of incorporation, but business contracts.

The *time* the companies had in which to pay the bonds, and the manner of their payment, were parts and essential parts of the contract, and when the companies had constructed the road so as to be entitled to receive the bonds and patents for lands, and had received them, the right to the *time* and the manner in which they were to pay the bonds became vested rights in the companies, just as much as their rights to the lands were vested rights, and neither could be changed by any act of the other party to the contract.

So the contracts stood when, as was required by the act, the Central Pacific Railroad Company of California, executed, under its corporate seal, and filed in the Department

of the Interior its acceptance of the act, so it stands to-day, and must stand until the end of thirty years from the date of the bonds; that nothing is due from the company to the Government, except the one-half of the compensation for Government service, and five per cent. of the net earnings, and those only on the roads of the company on which the bonds were advanced in aid of construction.

Now what does the Thurman Act say:

Section 1 provides how the net earnings of the company after June 30th, 1878, shall be ascertained.

Section 2. That the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the Government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking fund hereinafter provided, for the uses therein mentioned.

Section 3 provides for a *sinking fund* to be established in *the Treasury of the United States*, to be invested by the *Secretary of the Treasury in bonds of the United States*, the semi-annual income to be in like manner invested.

Section 4 provides that there shall be carried to the credit of said fund, on the first day of February in each year, the one-half of the compensation for services rendered for the Government by said company, not applied in liquidation of interest (*that is the one-half which, by the contract, the company is entitled to receive in money as soon as it is earned*), and in addition thereto, the said company shall, on said day, in each year, pay into the Treasury to the credit of said sinking fund, $1,200,000, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road, payable to the United States, under said Act of 1862, and the *whole* sum earned by it as compensation for services for the United States, together with

the sum by this section required to be paid, amount in the aggregate to *twenty-five* per cent. of the whole of the net earnings of said railroad company, ascertained and defined as hereinbefore provided, for the year ending on the 31st day of December next preceding.

That is to say, the United States, one of the parties to a contract, admitted to have been made mainly for its benefit, can, without consent of the other party, change that contract after it has been executed and acted on for years, so as to retain and deprive the other party (the company) of the use of the *whole*, instead of *one-half*, of all moneys earned by the company, as compensation for Government services, and in addition thereto, require the other party to pay and deprive itself of the use of one million two hundred thousand dollars, or so much thereof as shall be necessary to make the five per cent. of the net earnings above mentioned, and said whole compensation for Government service amount to *twenty-five* per cent. of the whole net earnings of the company.

These sums are to go into a sinking fund in the hands of the party that makes the change in the contract (the United States Treasury), and all the moneys paid in, and the accumulations thereon are to be invested in the bonds or securities of the same party to the contract (the United States).

It can hardly be necessary to do more than call attention to such an act as this to establish the utter worthlessness of such legislation.

This court held in the five per cent. case above cited, that "*the amount of the indebtedness is fixed and unchangable.* The amount of *the five per cent.* and its receipt at one time or another, is simply a question of earlier or later payment of a *debt already fixed in amount.*"

By the Thurman Act the company will not only be indebted to the Government for the amount of the bonds and interest, but at the end of each year it will be indebted in the amount required by the act to be paid into the sinking fund, and which the company shall have failed to pay in.

By the Thurman Act, the Government, one of the par-

ties to a contract, without any default of the other party—without any allegation or pretense of default, and without any legal proceedings, constitutes itself a receiver of the property or moneys of the other party, and then proceeds to declare the pains and penalties which shall follow a failure to perform the conditions of the act.

It appoints itself a receiver not only of part of the earnings of the road on which the Government bonds were advanced to aid in building, but also of part of the earnings of the company on roads with which the Government had no connection, and on which, or its earnings, it has no lien whatever.

The Thurman Act, in section 6, prohibits a corporation created and existing under the laws of California, and not under the laws of the United States, from voting, making, or paying any dividend to its stockholders when it is in default in respect of the payments required to be made to the sinking fund, or in respect of the five per cent. of net earnings, or in respect of interest on any other of its debts which is paramount to the lien of the United States, and makes the officer or person who shall vote, declare, make, or pay, and the stockholder who shall receive any such dividend liable *to the United States* for the amount thereof to be paid into the sinking fund. And every such officer, person or stockholder who shall knowingly vote, declare, make or pay any such dividend shall be deemed guilty of a misdemeanor, and on conviction, shall be punished by a fine not exceeding ten thousand dollars, and by imprisonment not exceeding one year, and this, notwithstanding such dividend may be perfectly legal and proper under the law that created the corporation and under which it exists, and although the moneys distributed in dividends may have been partly, and even wholly, earned on its roads on which the Government has no lien.

Section 7 of the act provides that the sinking fund shall at the maturity of these United States bonds be applied to the payment and satisfaction thereof.

Section 8. Directs that this Sinking Fund shall also be held for the protection, security and benefit of other credit-

ors of the company having claims paramount to those of the United States;

Thus requiring this California corporation, which by the *State* law under which it is organized, is compelled to establish Sinking Funds for the redemption of all its mortgage bonds, on or before maturity, and has established such Sinking Funds, now to establish, and pay large sums into another and an additional Sinking Fund for the security and benefit of the same mortgage creditors. *This is taking private property for private use.*

Section 9. Makes all sums due to the United States from the company, *whether payable presently or not*, and all sums required to be paid to the United States, or into the Treasury, or into the Sinking Fund, under this act or otherwise, a lien upon all the property, rights, income and franchises of the company, whether derived from the United States, or from any other source.

Thus attempting to create a lien on all the property of this California corporation, which was not reserved or agreed to when the contract of 1862 and 1864 was made.

Section 10. Makes it the duty of the Attorney-General of the United States to enforce the various provisions of this act, and of other acts, and then provides in section 11, that if the company shall fail to perform all the requirements of this act, and of any other act, for six months, such failure shall operate as a forfeiture of all the *rights, privileges, grants* and *franchises* derived or obtained by it from the United States, ard making it the duty of the Attorney-General to cause it to be enforced. Making acts which were before lawful and allowable under the contract, to be a crime under this act, punishable by fine and imprisonment of its officers and managers, and also inflicting upon the company itself the highest penalty known to the law, against a corporation, a forfeiture of all its rights, privileges, grants and franchises.

The original Act of 1862, and the amendment of 1864, contained all the conditions and penalties that the Government deemed necessary, when it made the contract. The

company is bound by those, and so is the Government, and they are ample for the protection of the Government. Those penalties and conditions cannot now be added to or enlarged. But it is said that the company agreed in the 18th section of the Act of 1862, and in the 22d section of the Act of 1864, that Congress might at any time alter, amend or repeal this act. So it did for certain purposes, under certain contingencies mentioned in said 18th section of the Act of 1862, *having due regard for the rights of the company*, all which are as controlling upon the power reserved in the 22d section of the Act of 1864, as they would have been if again repeated. The two acts being construed together, and the limitations of said 18th section being in force, unrepealed when the contract was closed, and accepted by the company, and when the road was completed.

It has been decided by this court that the railroad and telegraph have been constructed and completed in conformity with the acts of Congress, and long before the prescribed time, and it is not pretended that the company is not keeping the same in working order, or that the Government is not having the full use and benefit thereof, for all purposes as agreed. In other words, it is not pretended that the company is in any default. Until default has occurred in some of the conditions and provisions of the acts for which such a remedy was reserved, Congress cannot exercise its reserved power of amendment, and even if a default should occur, such amendment only can be made as will not impair the obligations of the contract, or deprive the company of any vested right of property.

I respectfully ask the attention of the court to an argument, on the subject of this act, prepared for another purpose, by a very able lawyer, which I am permitted to attach to this brief.

JAMES H. STORRS,
For Appellants.

AN ARGUMENT

AGAINST THE CONSTITUTIONALITY OF AN ACT ENTITLED "AN ACT TO ALTER AND AMEND THE ACT ENTITLED 'AN ACT TO AID IN THE CONSTRUCTION OF A RAILROAD AND TELEGRAPH LINE FROM THE MISSOURI RIVER TO THE PACIFIC OCEAN, AND TO SECURE TO THE GOVERNMENT THE USE OF THE SAME FOR POSTAL, MILITARY AND OTHER PURPOSES, APPROVED JULY FIRST, EIGHTEEN HUNDRED AND SIXTY-TWO,' AND ALSO TO ALTER AND AMEND THE ACT OF CONGRESS APPROVED JULY SECOND, EIGHTEEN HUNDRED AND SIXTY-FOUR, IN AMENDMENT OF SAID FIRST NAMED ACT," APPROVED MAY 7, 1878, AND KNOWN AS THE THURMAN ACT.

In endeavoring to come to a proper construction of an act of legislation as well as of a contract, it is often necessary to transport the mind back to the condition of things existing when the legislation was had, or the contract was made.

When we set about the construction of an act of Congress like either of those referred to, the mind, unless the error be strictly guarded against, is very much disposed to confine the consideration of it to the circumstances surrounding the subject matter at the time of investigation, instead of looking back to the state of affairs in view of which the legislation was adopted. Such is more peculiarly the case in respect to the two great railroad corporations, the Union and the Central Pacific, which embody great wealth and exert vast powers; and consequently are subject to great envy and stir up violent enmities. Thus most people who do not trouble themselves with examining matters touching these immense national enterprises, save in connection with immediate exigencies, now construe the above mentioned Acts of 1862 annd 1864 respecting the rights and duties of these corporations very differently from the construction which they would have put on them at the date of their passage.

Let us then look for a moment to the condition of the country when these acts were passed.

The construction of a railroad connecting the Valley of the Mississippi with the Pacific Ocean was no new idea when the first Act of 1862 was passed. The subject had then long been mooted, but it was looked upon as an enterprise of such vast proportions that no capitalist would venture to embark in it. For more than twenty years previously thereto had its feasibility been agitated, yet no one was found to undertake it.

In 1861 the war between the North and the South broke out. Eleven Southern States stood in hostile array against the other States of the Union. The territory west of the Sierra Nevada Mountains, including California, with its already great resources, and immensely greater anticipated in the immediate future, and which was thought by many to hang loosely on the skirts of the Union, was separated from the Eastern States by vast tracts of unsettled, unoccupied, sterile and desert regions, traversed by hostile tribes of savages, extending over two thousand miles and more of distance.

It was, at that time, and long afterwards, a very general impression, which probably was true, that the Southern confederacy was making great efforts to carry California, with the rest of the Pacific regions, out of the Union, and it was well known that a comparatively small, but active and influential, portion of the citizens of the gold State was earnestly striving to attain the same end. These facts were, undoubtedly, well known to the members of Congress at the first session after the breaking out of the war, which met in December, 1861, and which passed the Act of 1862, referred to.

At this session was instituted the railroad system which now spans the continent. It then required from three to four weeks to carry the mail from the National Capitol to the Pacific coast, and it would have taken as many months to march an army or to transport material of war from the western settlements of the Mississippi valley to the plains of California.

Suppose California and Oregon should join themselves to the Southern confederacy? Suppose, and which was more probable, that they should set up for themselves an independent government; it was frightful then, the retrospect is fearful now, to contemplate the abyss of disintegration over which the Union was then hovering. Congress thought that one of the surest, if not the only sure means, to prevent the catastrophe was to weld the shores of the Atlantic with the shores of the Pacific with bars of iron which could never be dissevered. An unprecedented

war was then waging, the expenses of which were running on and swelling with awful rapidity. And what if the Government, in order to protect and secure the Pacific coast, should suddenly be called upon to march an army of five or ten thousand men with cavalry, artillery and munitions of war, across deserts and over moutains in the shortest possible time? Who could estimate the expense? Who able to compute the necessary loss of life, of beasts of drafts and of burden? A few expeditions would cost enough to lay a good railroad. And what if such a road should cost the Government one hundred millions of dollars, besides the amount which private capitalists would be willing to subscribe and pay for the stock? And if a railroad was to be built at all, it ought to be completed in the shortest possible time, so that the use of it, or at least part of it, might come in play before the great war was ended. And, besides, the bare incurring of a liability for a hundred or two millions, payable many years thereafter, when the country would have a population of seventy-five to eighty millions, did not appear so very large a sum to a government that was every day spending many millions in the prosecution of the war.

The above remarks have been made for the purpose of showing that the Congress of 1861-2 was disposed to deal on a scale of great liberality with enterprising men who would come forward and assume the responsibility of carrying the contemplated scheme into effect.

Those were days of grand ideas, of lofty aspirations, and of daring undertakings. Everything was on a grand scale. The spirit of the whole nation was buoyed up by the most intense patriotism. Out of its vast domain, what were ten sections of land per mile along the proposed route of the railroad? An inconsiderable trifle, especially as it was expected to double the value of the ten other alternate sections reserved for Government. What was $16,000 a mile, to be paid thirty years thereafter? What were all these to a nation—if it conquered the rebellion—of 4,000,000 of square miles? Besides, the reduced expenses of carrying the mails, alone, during the thirty years, to say nothing of the transportation of troops and warlike stores and materials, would in all probability more than compensate for all expenses. And the confident audacity of the giant enterprise would do as much to discourage the rebellion as an armed host. What, too, would foreign nations think of their schemes of intervention against a people possessed of the sublime self reliance to engage in an undertaking greater than the building of the pyramids, while at the same time prosecuting the greatest war which has yet cursed the world?

Now, let us place ourselves back in the days of 1861–62, and ask ourselves if we should then have thought that the terms which were held out by the Act of 1862 were too favorable to those who should be willing to accept them, and initiate the proposed work. The labor and expense, the ingenuity and boldness demanded for carrying out the plan, so far at least as the Western or Central Pacific part of the road was concerned, were far greater than had been found necessary in any former railroad project. Consider for a moment the fact that the iron rails were to be transported around the Horn—a necessity which of itself was sufficient to deter all but the most daring operators from embarking in the scheme. But it is unnecessary to follow out these hints. It was manifest, at that time, that the most liberal inducements which could be held out would be demanded for the acceptance of so unexampled an undertaking.

It was with such views, entertained both by Congress and the people, that the Act of 1862 was passed. And it was found that the rewards held out by that act proved insufficient for the exigencies of the time.

They were deemed liberal as they may *now* after the fact be looked upon; but they were in fact too small and inadequate a consideration for the intended work. Consequently, two years afterwards, the Act of 1864 was passed. By this act the compensation was considerably increased, and propositions more liberal in other respects were made. The great object of the Government, then, was to get the road built, and that, too, with the least practical delay. The war might drag along for an unknown series of years. A railroad across the continent might even be the means of saving the Republic. A few hundred millions were but inconsiderable trifles compared with the supreme end in view—the ultimate salvation of the Union, embracing the Pacific coast, which was looked to as supplying the very sinews of war. Better double or treble the cost, if the work could be done in *five* instead of *ten* years thereafter. The period allowed by the Act of 1862 for the completion of the work was twelve years, thus extending the time to the year 1874. Every year less than that date might determine the great question of union or disunion. It is so much easier to see the result of great affairs of peace and of war after they are concluded than while they are in progress. How much more exorbitant do the terms offered to the railroad companies appear now, after the shadow of the great contest has passed away, and the grand trans-continental line of railway has been completed, and we are every day familiar with its benefits, than it seemed to the legislators

and people who endured the heat and burden of "the times that tried men's souls!"

Turning our thoughts back, then, to the dates repectively of these acts of Congress, and realizing so far as we can the circumstances then existing, let us endeavor to find out the meaning of those acts, as we would have done in the freshness of the undertaking. In confirmation of the views above expressed and of the propriety of looking to the circumstances at the time when this legislation was adopted, I refer to the case of *United States* vs. *Union Pacific R. R. Co.* (91 U. S. R. 72). In that case it was held that the interest on the United States' subsidy bonds was not due and payable by the company until the end of thirty years, when the principal would fall due.

The Court there say: "But Courts, in construing a statute, may, with propriety, recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it." And the Court further say: "Many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed." The Court then proceeds to enumerate some of those circumstances, and I specially call attention to this part of the opinion in confirmation of the views I have above expressed. Again the Court say (*id. p.* 81): "No argument can be drawn from the wisdom that comes after the fact, Congress acted with reference to a state of things believed at the time to exist, and in interpretation of its legislation no aid can be derived from subsequent events." And again: "It was a national work originating in national necessities, and requiring national assistance." Indeed, the whole of the opinion, from page 79 to 82, inclusive, is instructive, and indeed authoritative on the branch of the subject now under consideration.

What, then, was the offer proposed by these two acts of Congress, and accepted by the two companies? Did the acts of the Government, by its legislation, and of the companies by their acceptance, constitute a contract or an *aggregatio mentium* which partakes of the legal nature and binding efficacy of contract? Although it may not, when Congress is the legislative body, fall within the provision of the United States Constitution, which prohibits the impairing of the obligation of contracts, yet the relation may be of such a nature as to be protected to an equal extent by the eternal principles of right and justice, upon which

all constitutions and all laws must rest, and which are the very foundation and cement of all civil society.

The title of the Act of 1862 is "An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes." "It has been observed by this court that the title to an Act" says Mr. Justice Davis, in the case above referred to (91 U. S. p. 82), "especially in Congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title. This is true, and we have no disposition to depart from this rule; but the title even of the original Act of 1862 * * * seems to have been the subject of special consideration, for it truly describes the general purpose of Congress in passing it." Again, he says (*id.*): "The Act itself was an experiment. It must be considered in the nature of a proposal to enterprising men to engage in the work, for with the untried obstacles in the way, there was no certainty that capital could be enlisted. If enlisted at all, it could only be on conditions which would insure in case of success, remuneration proportionate to the risk incurred." (See, also, Cooley on Const. Lim. p. 172, 4th Ed.) For the construction of the whole route two companies were employed, the Union Pacific and the Central Pacific.

There is in one particular an important distinction between these companies remotely affecting the discussion. The Union Pacific Company is a corporation created by Congress. The Central Pacific Company's charter is held, or rather it is incorporated and has its corporate existence under the general laws of California. Each company is a body corporate, the one deriving life from the sovereignty of the United States, and the other from the sovereign power of the State of California. Now it is manifest that the existence of neither company can be destroyed, nor can it be deprived of any of its franchises by any sovereignty but the one to which it owes its being. This, however, but slightly affects the subject under immediate consideration. A corporate body is one thing, the property owned by it is another thing. It may be deprived of all its property and still exist with all its corporate franchises untouched. Thus, the Central Pacific Railroad corporation, being created by the State of California, would still remain the same corporate body though the United States Government had the power and exercised it to take away the road, fixtures, land and all other property of the corporation. The rule is the same as though the corporation were a natural person.

The existence of an individual person is distinct from the property he possesses. The person may exist and have no property. The declaration of Shylock: "You take my life, when you do take the means whereby I live," must be taken in a figurative sense. So the existence of a corporate body may endure without owning property.

The Central Pacific Railroad Company existed as a body corporate before it was endowed by the United States with property or right of property, and it would continue to exist with all its original franchises, though the general government both could and should deprive it of all the property which it conferred upon it.

We thus see the difference in the condition of these two corporations. Even if the United States has the power to destroy the corporate existence of the Union Pacific Company, it has no such power over the Central Pacific Company.

My object in these remarks is twofold: first, to distinguish between a corporate existence and its property; and second, to eliminate the Union Pacific Company and its affairs from this discussion. For though the property and rights of each of these corporations are substantially identical, it will tend to avoid confusion to treat of the Central Pacific Company alone.

The Act of 1862 found the Central Pacific Company already in existence as a corporation, and it proceeded to deal with it as such by submitting to it certain proposals, which were accepted by the company.

These proposals were substantially the following:

1. To grant to the corporation five alternate sections of land on each side of the railway route, so far as the road should be built by the Central Pacific Company, until a connection should be formed with the portion of the entire railroad constructed by the Union Pacific Company.

2. A concession of the right of way over United States lands.

3. The privilege of taking timber and other materials from adjacent Government lands necessary in the construction of the road.

4. A loan of the credit of the Government to the extent of $16,000 per mile of the railroad, evidenced by bonds to be issued at different times as the road progressed, such bonds to be a first lien on the road, and payable thirty years after date, with interest at 6 per cent. per annum.

On the other hand, the Central Pacific Company was to build a first-class railroad with a telegraph line, and to transport troops, munitions, etc., and the United States'

mails, and give the use of the telegraph to the Government in preference to all other parties, and at ordinary rates of charges.

For portions of the road, bonds, treble in the above amount, were to be loaned.

I now come to the Act of 1864. Congress provided by this act that the company might issue its own bonds to the same amount as the United States' bonds, and that the former should constitute a first mortgage lien on the road, the lien in favor of the United States for the repayment of the amount of its own bonds being postponed to that of the company's bonds. The reason for this undoubtedly was that the company's bonds might sell in the market for a higher price. But the right of the United States to a preference at all times to the use of the road in the carrying of the mails and other transportation, and to the use of the telegraph, was not affected (see sec 6 of Act of 1862 and sec. 10 of Act of 1864). By the Act of 1862, all moneys earned as compensation for services rendered by the company for the United States was to be retained by the Government to be applied to the payment of the bonds issued by it and loaned to the company, and to the interest thereon (Act 1862, sec. 6). Under the Act of 1864, only one-half of such compensation was to be retained by the Government and applied in the manner above stated; the other half was to be paid to the company immediately, and whenever any service should be performed for the Government. In addition, the land grants were doubled (sec. 4, Act of 1864).

Such were the only changes made by the Act of 1864, so far as the questions now under discussion are concerned.

A few words here in explanation of terms. To economize words, and that the same technical terms may be always understood in but one sense, and to avoid confusion, I shall use the term "road" or "railroad" as including not only the track, but the rolling stock, fixtures, and all things named in the Acts of Congress appertaining to the railroad, and also to the telegraph line, with all its fixtures and appurtenances. The bonds issued by the company will the designated as "First Mortgage Bonds," and those issued by the United States and loaned to the company as "Government Bonds" or "Subsidy Bonds." I shall call the services performed by the company for the United United "Government service" or simply "services," and the price or compensation payable therefor by the United States to the company as "compensation money," or "compensation

price," or "compensation for services," or simply service "moneys."

I now recur to the relations of the two parties in the final and concluded arrangement between them, which continued to the end of the chapter, after the passage of the Act of 1864, and the acceptance thereof by the company. For there is nothing in subsequent legislation which varies their relative rights and obligations as established by these two Acts.

What, then, did each party undertake to do and perform? And first, what did Congress, on the part of the Government, undertake to do and perform?

Congress undertook and promised--1st. To grant and patent to the company ten alternate odd sections of land per mile on each side of the road (Sec. 3, Act 1862, as amended by Sec. 4, Act 1864), and patents were to issue for such lands as sections of the road of twenty miles each should be completed (Sec. 3, Act 1862, as amended by Sec. 10, last clause, Act 1864), which patents were to convey "the right and title" of the United States in the lands patented to the company (Sec. 3, Act 1862), which grants and patents were nevertheless made subject to the condition subsequent that all such lands which should not be sold or disposed of by the company within three years after the entire road should have been completed, should be subject to settlement and pre-emption at the price of one dollar and twenty-five cents an acre, instead of two dollars and fifty cents an acre, for which they were otherwise to be sold (Sec. 3, Act 1862, last clause). 2d. To issue its bonds to the company by way of loan whenever each section of twenty miles should be completed and accepted, one for each mile of $16,000 each, payable thirty years after such issue, with interest at six per centum a year, to be a second lien on the road after the first mortgage bonds authorized to be issued by the company, of equal number and amount, which were to constitute a first lien on the road (Sec. 5, Act 1862, and Sec. 10, Act 1864), and treble the amount of such Government bonds to be issued for a part of the road (Sec. 11, Act 1862). 3d. The right of way over all public lands in the regions through which the route of the road should run (Sec. 2, Act 1862). 4th. The right to take from the adjacent public lands timber and other materials for the construction of the road (Sec. 2, Act. 1862). 5th. To account for and pay over to the company one-half of the service moneys, and to apply the other half in payment of the Government bonds and interest (Sec. 6, Act 1862, and Sec. 5, Act 1864).

Such were the undertakings and promises of Congress as contained in the proposals to the Central Pacific Railroad Company, made by the Acts of 1862 and 1864, which proposals were duly accepted by the company (as to acceptance, see last clause of Sec. 9; Act of 1862).

Let us now see what the company, by accepting such proposals, undertook and promised to do, either by express or implied promise.

The undertaking and promises of the company, in law, were: 1st. To build and complete the railroad and the telegraph line according to the requirements of the two acts, and to keep the same in repair. (Act 1862, Secs. 3 and 6.) 2d. To perform such services of transportation, etc., etc., as should be required by the United States, at the ordinary charges for similar services, and in preference to all other service. (Secs. 3 and 6, Act 1862). 3d. To pay the first mortgage bonds and interest when and as the same should become due. 4th. To pay to the Government the amount of the subsidy bonds, and interest thereon at the maturity thereof. 5th. Not to demand of the United States direct and immediate payment of more than one-half of the price due for services performed for the Government. (Act 1862, Sec. 6, and of 1864, Sec. 5.) 6th. After the completion of the road, to pay to the Government annually five per centum of the net earnings of the road until the amount of Government bonds and interest should become due. (Sec. 6, Act 1862.)

Such, substantially, were and are the mutual promises and undertakings, express or implied, between the Government and the company, as resulting from the two acts of Congress and their acceptance by the company. And do they not constitute a contract? Do they not impose on either party all the obligations of contract? Are they not as binding, morally and legally, as equivalent stipulations would be in a written contract between individuals, formally drawn, and duly signed sealed and delivered by the parties? Though it may be the Government cannot be sued for a breach of its stipulations, that does not make them less obligatory *in foro conscientiæ*, nor less truly parts and parcel of a contract.

What is a contract? Promises or covenants to do or refrain from doing certain permissible things, upon a valid consideration by persons natural or artificial, capable in the law of contracting. All these particulars are formed in the relations between the Government and the company. Both parties were legally capable of contracting. What they mutually promised was permitted by law. The considera-

tion on each side was a valid and sufficient consideration, as the promises by one party were ample consideration for the promises by the other party. Mutual promises or covenants form mutual considerations. Laws which amount to propositions on the part of the State, will, if accepted by individuals, become binding contracts. (*Cooley on Const., Lim.* 347.) We have, then, a valid and binding contract.

Woodruff vs. *Trapnall*, 10 How. U. S., 190.
People vs. *Auditor-Genl.*, 9 Mich., 327.
Montgomery vs. *Kasson*, 16 Cal., 189.
Furman vs. *Nichol*, 8 Wall, 44.
Adams vs. *Palmer*, 51 Maine, 480.
Anton vs. *Wright*, 22 Grat., 833.

It was an executory contract. I speak as of the date when the contract was made. According to the terms of the contract, it was wholly executory. Every part of it treats of something to be done in the future, and the slight allusion to the few miles of road then built does not change its character.

It was executory even as to the grant of lands by Congress. The language of the Act, it is true, is: "That there be and is hereby granted to the said company," etc., etc., "every alternate section of public land," etc. (Sec. 3, Act 1862.) And it is true, as a general rule, that such language imports a grant *in præsenti*, either definite or floating. See—

United States vs. *Percheman*, 7 Peters, 51.
Id. vs. *Brooks*, 10 How., 442.
Mitchell vs. *United States*, 9 Pet., 711.
Lessieur vs. *Price*, 12 How., 60.
Ladiga vs. *Roland*, 2 How., 581.
Godfrey vs. *Beardsley*, 2 McLean, 412.
1 Lester's Land Laws, etc., pp. 506–7, 540, 549, 564, 500.

But that rule is not universally applicable.
Foley vs. *Harrison*, 15 How., 433.

This question must always be upon the construction of the statute—on the intention of the Act. to be gathered from all its parts. It is clear that it was the intent of this legislation that no title should pass from the United States until the issuing of the patents; or rather, more correctly speaking, until the consideration had been performed by the company which entitled it, according to the Act, to the patents. Section 3 of the Act of 1862 provides that when a given section

of twenty miles of the road shall have been completed to the approval of the President, "patents shall issue conveying the right and title to the lands" which shall have been earned by the company by the completion of the particular section. If the Act of 1862 leaves the matter in doubt, the doubt is cleared up by the 6th section of the Act of 1864.

This language is inconsistent with the supposition that the title had already passed. Besides, it is not consistent with the general scope and policy of the Act that the title should be conveyed faster than the consideration should be earned by the company, by the completion of successive sections of the road. The company might never finish the road. It might not get beyond the first two or three sections. Many contingencies might arise which might render impolitic an absolute grant in the outset of all the alternate sections along the entire surveyed route. Though the language used in the beginning of the section (Sec. 3) is strong enough to import a grant of title *in præsenti*, yet, qualified as it is by the subsequent clause above referred to in the same section, I do not think a grant *in præsenti* was intended by Congress, or was conceived of by the company.

The following propositions do not require further extended argument:

1. The completion of the road, and of each successive section of twenty miles each, was in performance of one of the promises of the company.

2. The rights and obligations of the parties depended on the completion of the consecutive sections of the road, and finally of the whole road; and the fact of the completion of each section was of necessity to be ascertained and declared in some way, binding and conclusive on both parties.

3. The sections of the two Acts (Sec. 4, Act 1862, Sec. 6, Act 1864) prescribe how the fact of completion of each road section should be ascertained and declared.

4. The Government having enacted and the company having accepted the proposals in the two Acts, the two parties thereby mutually agreed that the fact of completion of each section, and consequently of the entire road, should be ascertained and declared as in those Acts prescribed, and not otherwise.

5. When the fact of completion of any section of the road should have been ascertained and declared in the way prescribed in the Acts, that fact was finally and immovably settled and determined as between the Government and the company, and could not be unsettled or changed by any

authority, legislative or executive, nor, except for fraud, even by any judicial authority.

6. That then, and not till then, did the Congressional grant of lands take effect to any intent or purpose. Then, it did become operative to the quantity allowable to each twenty mile section of the road whether patents issued or not; as in such case patents would be but evidence or additional assurance of a previous grant by which a clear equitable title at least became irrevocably vested in the company.

Now, though I do not deem the above conclusions indispensable to the force of the subsequent part of my argument, I yet think that my reasoning will be made more apparent and more readily apprehended by establishing the fact that the title passed only as the road sections were respectively completed.

I conclude therefore that the contract was in all parts and certainly in most particulars an *executory* contract, that is, that it consisted of promises and undertakings, that the one party should perform certain acts in the future, in consideration of the promises and undertakings of the other party to do and perform certain other acts in the future. "A contract" says Chief Justice Marshall in *Fletcher* vs. *Peck* (6 Cranch, 133) is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing * * * A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed as well as one which is executory contains obligations binding on the parties."

It makes no difference that some thirty-one miles of the road had been built before the passage of the Act of 1864, inasmuch as no reference is specially made to this particular first section of the work in the contract, and this work is treated by the contract as part of the road yet to be built.

Having established that a contract existed and that it was in terms and intent an *executory* contract, let us now see how the contract become an *executed* contract. The design was that the road was to be built by sections of twenty miles each. (Secs. 4 and 5, Act 18 2, and as amended by sec. 10, Act 1864, last clause). Each successive section advanced the work until the road was completed. As each section was finished and accepted by the President of the United States, the company became entitled under the contract, 1st, to sixteen bonds per mile of the section of twenty miles completed, each bond being of the amount of

$1000, making in the aggregate $16,000 per mile, and treble that amount a mile for certain portions of the route most mountainous. 2d, to patents for the ten sections of land per mile each side of the road. 3rd, to one-half of the price for services, if any, rendered by the road or telegraph to the United States, and 4th, to the right to have the other half of such price applied by the Government in payment of the loan of bonds and interest.

The company, by the construction of the twenty miles section of road, the same being accepted, had paid in full the contract consideration for the four specific rights above mentioned.

The contract therefore on the part of the Government became then an *executed* contract, or, according to the common legal expression, the consideration due from the company was *executed*, and the company thereby acquired an absolute indefeasible *vested* right and property in the *four several rights* above named, which rights together constituted the Government's as yet unexecuted consideration due to the company by the contract for the company's now executed consideration. The company thus had the vested right to demand and receive from the United States, each and every of the above named four particulars of the consideration for which it had contracted to build the twenty miles section of road, and neither President, Congress nor judiciary could invalidate one iota of that vested right. A refusal to issue patents for the lands or to issue and deliver to the company the twenty times sixteen Government bonds, or to pay the one half of the service moneys, had any services been performed, or to apply the other half according to the contract, neither would nor could have diminished that vested right. And the vested right in the respective choses in action to which the executed consideration of the company had given birth, differs in nothing from the vested right in the choses in possession represented by such choses in action after the same choses in action should have been reduced to possession, save as the right to performance differs from performance itself.

"A vested right of action is property the same as tangible things are property, and is equally protected against arbitrary interference. When it springs from contract or from the principles of the common law, it is not competent for the Legislature to take it away."

(Cooley on Const. Lim. *p.* 449)

But the contract was performed by the Government itself. The grant of land took effect for each twenty miles section of road as the same was completed and accepted through

the operation of the Acts of Congress whether the patents were issued or not (*Wright* vs. *Hawkins*, 28 Texas, 152). And besides, patents were in fact issued as fast as the successive sections of the road were completed and accepted.

2d. So also with the Government bonds. As each successive twenty miles section of the road was completed and accepted, the company's contract consideration for the loan of the Government bonds became executed as well as that for the lands. Thereby the company's right to the bonds became a *vested right* in action, and when the bonds were delivered to the company, a vested right in *possession*. So far the contract was executed by both parties. Each completed section of the road was the consideration for an instalment of twenty times sixteen bonds which then became due to the company by the contract, and which were duly and justly paid to the company, and making the contract thus far an executed contract. The delivery of these bonds was in effect a loan by the Government to the company of the amount of money represented by the bonds.

3d. The same reasoning is equally applicable to the company's claim to one-half of the service moneys which might become due and payable from the Government as the road progressed, section after section. It can make no difference that the settlement between the parties and the actual payment were to take place annually. That was a matter of mere convenience.

The consideration for the *right* to *receive* such one-half of service moneys had been performed. The right to the service moneys stood on the same footing with the right to the lands and the right to the bonds. They all equally rest on the same undivided consideration: the completion of a section of the road. And as the completion of each section *vested* in the company the right to the lands and bonds pertaining to such section, so it *vested* also in the company the right to one-half of the compensation for any services which might have been performed up to that time on any part of the road, for such is the legal import of the contract, and we have seen that a right of property may as well be vested in a chose in action as in a chose in possession. The one can no more be interfered with than the other. The same consideration covers them all, and the execution of it has earned the same right to be paid the one-half of the service moneys as the rights which have accrued to the lands and to the bonds. I shall pass over without extended comment the other rights accruing to the company under the contract; the right of way and the right to materials from adjacent public lands. These rights stand on the same footing as the others.

They became vested in the company on the completion of each section, and even at the time of the use, provided the section were completed. These rights were acquired and paid for by the same consideration as the other rights named, and became vested in the company in no otherwise than the other rights mentioned.

And the Government might now assert a claim to be paid for the rights of way and for materials from adjacent lands with as much propriety and as nice a sense of law and justice as to interfere with either of the other rights vested by virtue of the contract. Now as the rights respectively above named became successively vested in the company to the extent of each section of the road as the same was completed by reason of the performance of the stipulated consideration named in the contract, and as the completion of each successive section executed the consideration for the reciprocal rights dependant thereupon and vested such rights in the company, it necessarily follows that when all the road sections were completed and accepted, the company's consideration for the entire contract had been performed and had thereby become an executed consideration in behalf of the company for the entire contract, and that the whole contract had thus become as to the company an executed contract, whereby the rights reciprocal to such executed consideration had become vested in the company as fully as any rights for which an adequate consideration has been paid, can be vested in any person whatever; and, on the other hand: as the Government lands were granted, and the patents issued and the Government bonds issued and delivered for every section successively as the same was completed and accepted, and as the right enured to the Government to demand and have the stipulated services over each section duly rendered by the company when and as each section was thus completed and accepted, and as the right of way and of adjacent materials for each section had been furnished by the Government as the work on each section advanced, it equally follows, that, when all the sections had been completed and accepted, the full consideration for the entire road had been paid by the Government; whereby the contract had to all intents and purposes become an executed contract on both sides, and the rights and property which had thus become mutually vested in either party, could not be divested.

When the whole road was completed, all the lands granted, and all the bonds delivered to the company had become the property of the company, in the same sense that a man's farm is his, or his house or goods; and also the right to

one-half of all future service moneys had become the property of the company, in the same sense as a just claim against his neighbor for a sum of money is the property of him who holds and owns it. To say all in one word, all these rights are vested rights. As such, to say nothing of Constitutional restraints, they are rendered inviolable by the universal sense of civilized man in all ages and in all countries and under all systems of laws. And it would ill become the "Model Republic" of the world to set the first example of disregarding them.

The contract was entered into by the company with the conviction that their rights would be inviolable or it never would have been entered into at all, and such must have been the understanding of the Government, as gathered from the emergencies under which the contract was made.

I have now established, I trust, that the Acts of 1862–64, with the acceptance thereof by the Central Pacific Railroad Company, perfected a contract between the Government and the Company—that the consideration consisted of mutual promises and undertakings, the promises and undertakings of the one party being the consideration for the promises and undertakings of the other party– that the company fully performed the part of the contract by it to be performed whereby the consideration of the contract on its part became executed; by virtue whereof a perfect right to the full consideration from the Government became vested in the company, and that this vested right became vested in possession by the grant of the lands and the delivery of the Government bonds, and that these vested rights could not be divested upon any principle or theory known to our laws

I now come to the Act of Congress called the Thurman Act, passed on the 7th day of May, 1878. After a long preamble, wherein, however, no charge is made against the company of breach of its contract or bad faith, the first section of the Act provides that the net earnings out of which the five per centum was to be paid by the company to the government, by the last clause of Section 6 of the Act of 1862, "shall be ascertained by deducting from the gross amount of its earnings * * * the necessary expenses actually paid within the year in operating the (road), and keeping the same in a state of repair, and also the sum paid by (it) * * * within the year in discharge of interest on (the) first mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said company for interest upon any other portion of its indebtedness," etc. What is net earnings according to the Act of 1862 is a judicial ques-

tion, and not the subject of legislation. In so far, then, as this first section of the Thurman Act attempts to establish a different rule from that fixed by the former Acts, it is invalid.

By section 2, all the service moneys are to be retained by the United States, one-half thereof to be applied in payment of interest on the Government bonds, and the other half to be turned into a sinking fund established by the Act.

Section 3 provides for the formation of the sinking fund. Section 4 is the important section. This section, so far as as the Central Pacific Company is affected, is as follows:

"That there shall be carried to the credit of said fund, on the first day of February in each year, the one half of the compensation for services hereinbefore named, rendered for the Government by said Central Pacific Railroad Company, not applied in liquidation of interest, and in addition thereto, the said company shall on said day in each year pay into the Treasury, to the credit of said sinking fund, the sum of $1,200,000, or so much thereof as shall be necessary to make the five per centum of the net earnings of its road payable to the United States under the Act of 1862, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of the railroad company, ascertained and defined as hereinafter provided for the year ending on the 31st day of December next preceding."

If I understand this section, it provides: 1st. That the whole of the service moneys are to be retained by the Government. 2d. That the five per centum is to be paid as by the Act of 1862 is provided. 3d. That after adding together the five per centum and the whole amount for a given year of the service moneys, if such sum does not amount to twenty-five per cent. of the net earnings, the company is to pay into the sinking fund so much of a sum of $1,200,000 as shall make the two added sums just mentioned equal to twenty-five cent. of net earnings, but the whole sum required to be annually paid to the Government, including service moneys earned, shall not exceed $1,200,000.

We are now enabled to see wherein the Thurman Act is more burdensome on the company than the two original acts under which the road was built.

By the two acts, one-half of the service moneys was to be paid annually to the company; by the Thurman Act it was to be appropriated to another purpose. By the first two acts, only five per cent of the net earnings is to be paid to the Government annually; by the Thurman Act, twenty-

five per cent. of the net earnings (including service moneys) is to be paid annually to the Government, provided such twenty-five per cent. does not exceed $1,200,000. But the vested right of the company, as we have seen, entitled the company to the use, benefit, and income of the road, except as it had agreed by its contract to surrender them; for a vested right in the property implies the sole use and income thereof, save as the same have, by the contract under which it was acquired, been given up and surrendered.

By the original Acts, one-half of the service moneys was to be paid by the Government to the company when and as the services were performed; by the Thurman Act, none of it is to be paid, but the whole is to be retained in the hands of the Government. By the original contract only five per cent. of the net earnings was to be paid annually to the Government; by the Thurman Act, twenty-five per cent. of the net earnings must be made up annually to the Government, provided not more than $1,200,000 shall be required for that purpose, the service moneys, however, forming part of such twenty-five per cent.

We have thus seen what the Thurman Act is. That it attempts to effect a radical change in the contract resulting from the Acts of 1862 and 1864, no one will deny; though there was some pretense of that sort in the Senate when the bill was on its passage. If the change can be sustained at all, it must be by virtue of the reservation in the last clause of Section 18 of the Act of 1862, and in the 22d section of the act of 1864. We may as well lay aside at once all attempt to look for any other or additional ground or excuse for the change. If it cannot be found in the clause and sections just referred to, the power does not exist at all, and the attempted change is inequitable, oppressive, tyranical and unconstitutional. The clause of Section 18 and Section 22 should be construed together. Section 22 was unquestionably added to the Act of 1864, in order to continue in force the reservation of the last clause of Section 18 of the Act of 1862, and not for the purpose of enlarging or extending its scope, or of reserving a new or superadded power.

The clause of Section 18, referred to above, is as follows:

"And the better to accomplish the object of this act, namely, to promote the public interest and welfare, by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use

and benefits of the same for postal, military and other purposes, Congress may, at any time, *having due regard for the rights of said companies named herein*, add to, alter, amend or repeal this act."

Let us analyze this clause. What are the purposes for which this power to add to, alter, amend or repeal was reserved? They are:

1st. To promote the public interest and welfare by the construction of the railroad and telegraph line. It will be observed that this power does not extend to the promotion of "the public interest and welfare" generally, but simply so far as they may be promoted "by the construction of said railroad and telegraph line." But the said railroad and telegraph line had been "constructed" and completed, and accepted by the Government as fully constructed and completed, long before the enactment of the Thurman statute. This power, then, had become *functus officio* before the Thurman Act was passed. The power to alter, etc., in order to promote "the public interest and welfare by the construction of the railroad and telegraph line," did not exist to be made use of by the Thurman Act. It was gone forever before that date. The exercise of the power to alter, etc., cannot be supported in this particular.

2d. The next power to alter, etc., reserved, is to promote tbe public interest and welfare * * * "by keeping the same" (the railroad and telegraph line) "in working order." Well, they have been kept in working order ever since their completion. They were in good order, and always had been, when the Thurman Act was passed. A state of things had not yet been developed to warrant the exercise of the power to alter, etc., in order "to promote the pubiic interest and welfare by keeping the railroad and telegraph line in working order" when the power to "alter," etc., was sought to be exercised by the Thurman Act. As in the first above instance, the power to alter, etc., to promote the *construction* of the road had passed away, so, in the present instance, the power for the purpose of keeping the road in working order had not arisen. It must be recollected that here was a contract. Congress had not the power to alter, etc., whenever it might graciously be pleased to think proper. Such was not the contract. The power to alter, etc., was to be exercised only when certain emergencies arose. Before such emergencies were developed, Congress had no more power to alter, etc., than if this clause had been omitted from the act. The contract must be construed, not according to the one-sided whim of a single party, but as it was understood by both parties at the time of its adoption.

At that time both parties must have understood the reservation of power to alter, etc., in the sense which I have above given. Or, perhaps, the more exact rule of construction in this case would be, that the contract must be interpreted and understood in the sense in which Congress supposed at the time that the company understood it. And is it to be supposed that the company then understood, from the reservation of the power to alter, etc., that they were to be exercised whenever Congress saw fit, irrespective of the consideration whether the contemplated state of facts had arisen? The supposition is preposterous.

3d. The clause of the 18th section reserves the power for one other purpose; it is "to secure to the Government at all times (but particularly in time of war) the use and benefits of the same" (the road and telegraph) "for postal, military and other purposes." But have not "the use and benefit" of both railroad and telegraph been "at all times" secure to the Government "for postal, military and other purposes?" Has the Government ever complained of a lack of facilities? The preamble of the Thurman Act itself does not allege or suggest a solitary default in any particular for which the power to alter, etc., is reserved. It would seem that if any causes of complaint had existed, they would have been referred to in this preamble. The act contains an almost unprecedented number of recitals inserted no doubt, for the purpose of showing to the public all the grounds that existed tending to justify Congress in enacting the oppressive provisions contained in the act. It is not to be doubted that if other causes had existed, especially if misconduct or default were justly chargeable to the company, they would have been conspicuously put forward in the preamble. But no complaints are made in the preamble, and doubtless for the best of all reasons, that no cause of complaint existed.

No, it is for far other and different purposes that the power to alter, etc., is sought to be carried out in that act. It is to compel the payment of a claim before the same becomes due; to exact compensation for breach of contract before the contract has been broken, through apprehension that it might be broken at some future day.

It will be noticed that not one word can be found in the Thurman Act that points to either of the contingencies mentioned in the clause of the 18th section as the basis of the power to alter, etc. The reasons for the passage of the Act are altogether of a different character. They are that the company declines to pay its debt to the Government contracted by the loan of its bonds to the company, some

scores of years before it matures, and because it is not disposed to pay to the United States, the amount of their loaned credit, some scores of years before the United States can be required to make up the original sum. In other words, the Thurman Act seeks to compel the company beyond any stipulation in the contract, to deposit in the Government's hands, annually, in advance, certain sums of money, in order that the Government may possess the funds to pay its bonds many years before they fall due. Such was not the contract. The powers reserved were not to be exercised for any such object. Such are not the enumeration of the powers reserved in section 18. Had it been the intention that Congress should possess a general and indefinite power to alter, etc., why specify particulars? This is the very case for the application of the maxim *expressio unius exclusio alterius est.*

4th. Nor have we yet seen all the clauses of section 18. It contains a limitation upon the power even when the contingencies may have arisen which might warrant the exertion of them. Whenever, and under whatever circumstances these powers are invoked and exercised, it must be "having due regard for the rights of said companies." These quoted words must mean something. They cannot be treated as surplusage. They suggest the delicacy with which that Congress contemplated any interference with rights which might grow out of that Act. If, then, any alteration, etc., be made by Congress in respect to the affairs of the Central Pacific Railroad Company, it must be with "due regard for the rights" of the company. Is such *due regard* manifested by an usurpation of its vested property by compelling it to pay accruing debts years and years before they become due? By refusing to pay its own indebtedness to the company for services performed, the payment for which is required by the contract as soon as they are rendered? By confiscating the first fruits of the contract gained by the company by a full and complete performance of all provisions of the contract by it to be performed? The words quoted guard the company against every kind of inequitable or injurious treatment in the exercise of the reserved powers even though such powers should be called into exercise strictly in pursuance of the necessary limitations.

In view, therefore, of the foregoing considerations, it is plain that when the Thurman Act was passed, no such state of facts had arisen as would justify resort to the harsh and irritating measures of "adding to, altering," etc., the original contract between the Government and the company, and that the alterations, etc., which form the burden of the

Thurman Act do not "have a due regard for the rights of the company."

The Acts of 1862 and 1864 are often spoken of as reserving to Congress the right to alter, etc., the *contract* consummated by the acceptance of these Acts by the company.

Such a view, however, argues a misapprehension of the nature of the legislation alluded to. The powers specified in section 18, last clause of the Act of 1862, and section 22 of the Act of 1864 are to alter, etc., not the contract, but those "Acts." There is a vast difference between the meaning of the one form of expression and that of the other. No express power exists to alter, etc., the contract. If such power can be found, it must be deduced through the power to alter, etc., the Acts. I see no objection to Congress adding to it, altering, amending or repealing the "Acts," one or both. By so doing, Congress cannot affect the rights and property which have grown out of an executed contract. Even the repeal of a legislative Act under which vested rights have sprung into existence while the act was in force does not affect such vested rights. This doctrine does not admit of dispute or question. Rights vested under a statute are not lost by a repeal of the statute; nor *a fortiori* by an *amendment* or *alteration* thereof, or by an *addition* thereto.

From the foregoing remarks it will appear that the power reserved in the Act of 1862 can be exercised only in furtherance of and to carry out the purposes mentioned in the eighteenth section; and then with the further limitation and qualification that such alteration shall not trench upon or interfere with the vested legal rights of the company. If, however, no such qualifying words had been used in connection with this reservation of power to alter, etc., the limitation of the exercise of the power would have been the same.

Many of the States have constitutional provisions or general statutes to the effect that charters granted to corporations, or laws under which corporations are formed, may be altered, amended or repealed at the will of the legislature.

Judicial interpretation has frequently been given to such reserved powers.

In the case of *Commonwealth* vs. *Essex Company* (13 Gray, 239), Shaw, Ch. J., speaking for the whole Court, uses the following language: "It seems to us that this power must have some limit, though it is difficult to define it. * * * The rule to be extracted is this: that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away

the property or rights which have become vested under a legitimate exercise of the powers granted."

In that case it was held that an amendatory act of the Legislature, purporting to be passed under a reserved power to alter, amend or repeal, was invalid because it interfered with a vested right.

In the case of *Commissioners, &c.*, vs. *Holyoke Water Co.* (104 Mass., 446), the court refer to the above case, and add "that it (the power reserved) at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant or any rights which have vested under it." (And see *Mayor, &c.*, vs. *N. & W. R. R. Co.*, 109 Mass., 112, and *Fitchburg R. R. Co.* vs. *Grand Junction, &c.*, 4 Allen, 205.)

In the case of *Miller* vs. *The State* (15 Wallace, p. 478), Clifford, Justice, says: "Power to legislate founded upon such a reservation in a charter to a private corporation is certainly not without limit; and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation."

The case of *Holyoke* vs. *Lyman* (15 Wal., 500) was a writ of error to the Supreme Court of Massachusetts to review the case above cited of *Commissioner* vs. *Holyoke Water Co.* (104 Mass., 446).

The Court in their opinion speak of the case of *Commonwealth* vs. *Essex Company* (Supra) with entire approbation and add (619) "vested rights it is conceded cannot be destroyed or impaired under such a reserved power" and again (p. 522) "Power to legislate founded upon such a reservation is certainly not without limit, but it may safely be affirmed that it reserved to the Legislature the authority to make any alteration or amendment * * that will not defeat or substantially impair the object of the grant or any rights which have vested under it."

The Central Pacific Company in the matter under consideration may in addition to what has already been said invoke an express provision of the Federal Constitution. It has been said that while the States are expressly prohibited from passing laws violating the obligation of contracts no such prohibition is placed upon the power of Congress.

The argument would seem to be that the States are inhibited from doing what in the language of Judge Story is "contrary to the first principles of the social compact and to every principle of sound legislation" (Story Eq. Jur. §

374) in order that Congress may enjoy a monopoly of the iniquity.

It is a sufficient answer that no such power has been delegated to Congress. But the provision in the 5th Amendment to the Constitution which declares that no person shall be deprived of property without due process of law is an ample protection against the invasion of private rights, such as is attempted by the Thurman Act. The term "due process of law" is synonymous with "law of the land."

Cooley Cons. Lim. 438., And see
Wynehamer vs. *People*, 13 N. Y. 393. Per Comstock J.
Hoke vs. *Henderson*, 4 Dev. (N. C.) 15.
Norman vs. *Herst*, 5 Watts & S. 193. Per Gibsen, J.

"The meaning is (says Judge Cooley) that every citizen shall hold his life, liberty, property, and immunities under the protection of the general laws which govern society. Every thing which may pass under the form of an enactment is not therefore to be considerod the law of the land."
(Id., p. 438.)

In the case of *Taylor* vs. *Porter* (4 Hill, 145) Justice Bronson used the following language: "The words *by the law of the land* * * do not mean a statute passed for working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense. The people would be made to say 'you shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.' * * * * It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses before either of them can be taken from him. It cannot be taken from him by mere legislation * * * The words *due process of law* * * cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property' (and see 2 Peters, 657.)

So in *Westervelt* vs. *Gregg* (12 New York, 209.)

Edmonds, J. says: "Due process of law undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such an Act as the Legislature may in the uncontrolled exercise of its power think fit to pass, is in no sense the process of law designated by the Constitution.

This construction has heretofore been adopted and is so obviously sound that the mere statement of it is sufficient."

And Denio, J., in the same case (p. 212), says: "The provision was designed to protect the citizen against all mere acts of power whether flowing from legislative or Executive branches of the Government."

Mr. Justice Strong in the Legal Tender case (12 Wal. at p. 549) says: "We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. *Undoubtedly not.*" Why not? Because such a contract is a chose in action, is property, and is protected by the clause in the 5th Amendment above referred to.

The case under discussion in this connection may be thus stated. The Government has loaned the Central Pacific Railroad $27,000,000 on a credit of thirty years with interest at six per cent. per annum. The debt, both principal and interest, by the terms of the contract has yet fifteen years and more to run.

Congress asserts the power by the Thurman Act to declare that the debt is presently due and to appropriate the property of the debtor to its immediate payment. For it is hardly necessary to say that if the power exists to demand and appropriate twenty-five per cent. of the earnings of the road it equally exists to exact the whole.

It requires no argument to show that such legislation is a clear infraction of the Constitutional provision referred to and for that reason alone is utterly void.

The word "property" as used in this clause means as well the proceeds and income from "property" as that from which they proceed. The funds received by the company for freight or passage are as sacred as "property" as the road itself. What is "property" of certain kinds, as lands houses, railroads, ships, &c., worth, save in as far as the income derived therefrom make it valuable. It is not perceived that property can be in one, in full and separate ownership with a right in another to control it and enjoy all its benefits. The sole value of property is in its use—to dissociate the right of property from its use * * would

be to preserve the name—the mere shadow—and destroy the thing itself—the substance." (*George* vs. *Ransom*, 15 Cal., 322.)

It has even been held that real estate may be conveyed by the description of rents and profits thereof. If then the company's road cannot be taken out of its hands by direct legislation of Congress—if such legislation would not be "due process of law," so neither can the income or proceeds of the road be thus taken.

Suppose Congress were to repeal the Acts of 1862 and 1864; the reciprocal rights both of the Government and the company would remain just as they are now, and just as they were at the time of the completion of the road. Such repeal would not take from the company the lands granted, nor its road, would not deprive it of the right to one-half of the service moneys, nor would it unmake the road the company has built, nor take away the right of way. Nor, on the other hand, would it affect the right of the Government to demand and receive from the company five per cent. of its net earnings; nor to demand and have the amount of its loan when the same shall become due. These reciprocal obligations, liabilities and rights would remain wholly unaffected by such repeal.

It is hardly necessary to add that *adding* to, *altering* or *amending* an act cannot possibly affect rights already vested pursuant to the act, to a greater extent than would a total repeal of the act.

It has been said that the words "to add to, alter, amend or repeal" as used in the Acts of 1862 and 1864 must be interpreted to have some meaning, and the question is asked, what force can be given them unless it be that which is ascribed to them in the Thurman Act? There is abundant scope for the operation of these words, without acceding to the latitudinarian use of them in the Thurman Act, and without stretching them to the destruction of vested rights. The numerous provisions of the Act of 1864 afford ample illustration of the appropriate use of the words. The whole act is composed only of "additions to and alterations and amendments" of the Act of 1862, without attempting to deprive the company of any rights which it had acquired under the original act.

I had intended to notice specially the new *lien* which the 9th Section of the Thurman Act imposes. But all my reasons and arguments apply with the same force to the newly imposed *lien* as to the unwarranted attempt to establish the sinking fund; the parties have not contracted for either the one or the other, and Congress has not the power to engraft any such terms on the original contract.

The Thurman Act is in reality an attempt to evade the decision of the Supreme Court in the case of *United States* vs. *The Union Pacific Company* (91 U. S., 72), in which it was held that the interest on the subsidy bonds was not due from the companies till the maturity of the bonds.

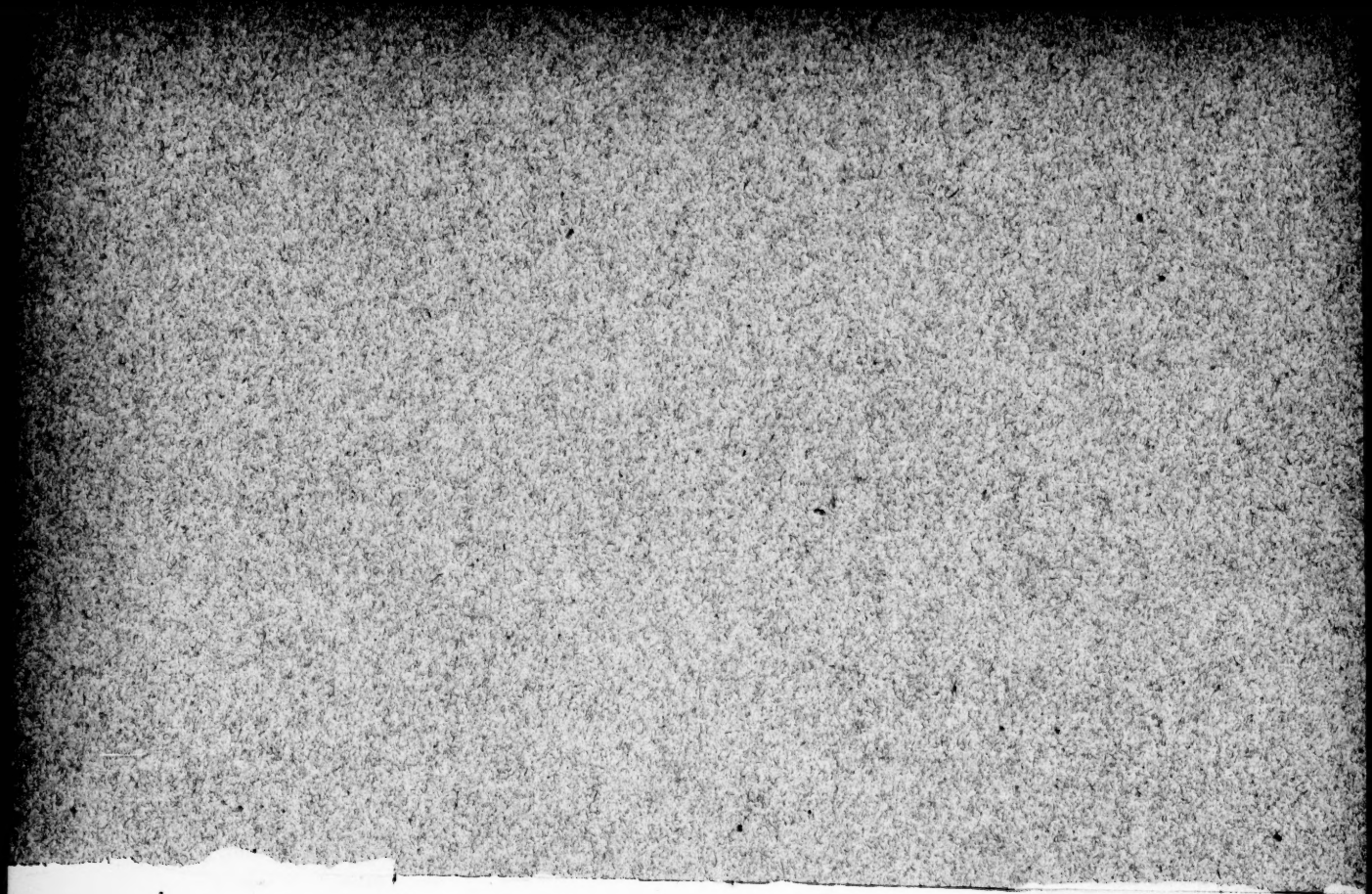
The Government had claimed, in clear opposition to the palpable import of the provisions of the contract, that the companies were bound to pay to the Government interest on the amount of subsidy bonds loaned them, as such interest should become due from the Government; or, in other words, that the companies should at all times put the Government in funds to pay the interest on such bonds. Had the decision been the other way, we should never have heard of the Thurman Bill or Act.

While the Thurman Bill was pending in the Senate, Mr. Edmunds put the question to Senator Hill: "If Congress should charter a National Bank for twenty years, and the bank accepts the charter, there being at the end a section which says Congress may repeal this Act at any time, cannot Congress repeal it within the twenty years?" The reply of Mr. Hill was in the negative. I do not agree with Mr. Hill. I think that Congress might repeal the charter in the case supposed. But such repeal would not affect rights of property which should become vested in the bank before the repeal. All real estate, promissory notes, bonds, bills, cash—in fine, every species of property owned by the bank—would be secure, for the reason that they would constitute *property* vested in the corporation.

The Thurman Act, in my opinion, is in plain violation of the United States Constitution, and is therefore void. It takes away and destroys vested rights in property, and in effect deprives the Central Pacific Railroad of its property, by appropriating the income of such vested property to purposes not contemplated by the contract under which such property became vested. It takes twenty-five per cent. of the net earnings instead of five per cent., as stipulated in the contract. It unlawfully divests the right to have and receive one-half of the service money; it imposes a lien not contemplated by the original contract; it makes penal acts which before were harmless; and it denounces forfeiture of vast properties, in punishment of acts which had until then been lawful and in strict conformity with the contract. If twenty-five per cent., instead of five per cent. may be taken, then fifty, seventy-five, or any other larger per cent., or the whole may be taken, and instead of the new lien as security, the Government might assume actual possession of all the property of the company, to be held as such security.

Mr. Justice Field, in his exceedingly able and learned dissenting opinion in the legal tender cases (12 Wal. 670), uses the following language, which no one will doubt is eminently applicable to the provisions of the Thurman Act.

"For acts of flagrant injustice such as these mentioned, there is no authority in any legislative body, *even though not restrained by any express constitutional prohibition. For, as there are unchangeable principles of right and morality without which society would be impossible. and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice upon the existence of which all constitutional Government is founded, and without which Government would be an intolerable and hateful tyranny.*"



In the Supreme Court of the United States.

OCTOBER TERM, 1878.

CENTRAL PAC. R. R. CO. ET ALS.
v.
ALBERT GALLATIN. } No. 972.

The Attorney-General moves that the above-entitled cause may be dismissed from the docket, because he says he is informed and believes that it is collusively brought against the plaintiffs in error by their own procurement to anticipate action by the government (known to be in contemplation, and speedily to be commenced), in order to obtain—in advance of their presentation in the course of actual litigation—a decision of mat ers mainly affecting the plaintiffs in error in their relations with the United States, and only incidentally and in a remote contingency affecting Mr. Gallatin, and then to but a trifling extent comparatively with its effect upon the plaintiffs in error. The purpose, obviously, is to procure a decision of this court upon the matters aforesaid, upon a state of facts and of the pleadings most satisfactory to the plaintiffs in error, rather than upon those likely to exist in the prosecution of actual litigation; and to submit the cause at a time and upon arguments suited to the convenience of the corporation, without regard to the wishes of the United States, the only real opponent of the railroad company in the matters to be determined.

The Attorney-General, therefore, moves the dismissal of this case; and if an opportunity is afforded will adduce evidence in support of its collusive character; in the mean time asking leave to refer to the affidavit of Mr. Love with reference thereto, on file, or which he now prays may be filed.

If the cause be not dismissed, the Attorney-General asks that he may be heard orally therein. The reason for making this motion at the present time is that the Attorney-General learns that the parties now propose to submit the cause upon their written arguments, under Rule XX; whereas the court, early in the term, refused to advance the cause without the assent of the Attorney-General, who declined to give such consent, and is now opposed to such submission of the questions at issue, which he desires may be heard and determined upon their merits in a case actually arising and formally presented by parties holding adverse rights and interests. The rights and interests of the United States he desires to present, as their legal representative; and, if heard orally in the pending cause, that it may be as such representative, and upon the constitutionality of the legislation to be considered and construed, as the same affects these rights and interests, and not merely as the attorney of either of these nominal parties.

CHAS. DEVENS,
Attorney-General.

SUPREME COURT OF THE UNITED STATES.

No.....

ALBERT GALLATIN,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

AFFIDAVIT

BY

JOHN L. LOVE.

Supreme Court of the United States.

ALBERT GALLATIN,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

John L. Love, a resident of the State of California, a citizen of the United States, and an officer of this Court, being duly sworn, deposes and says:

That he is personally acquainted with the plaintiff in this suit, and has been for a long series of years; that he knows the corporation defendant, and is familiar with its purposes, intentions and desires. This deponent says: that Albert Gallatin, the plaintiff in this suit, was formerly a clerk at Sacramento, in the hardware house of the firm of Huntington, Hopkins & Co.; that this firm was composed of Mark Hopkins and C. P. Huntington, two of the original directors of the Central Pacific Railroad Company. When these two last mentioned persons became extensively engaged in building the Central Pacific Railroad, they retired from the active direction of the firm of Huntington, Hopkins & Co., and at that time advanced the plaintiff in this suit to the position of managing man, and a partner in the house of Huntington, Hopkins & Co., at the city of Sacramento, in the State of California; and ever since that time he has been a member of the firm known by the aforesaid title of Huntington, Hopkins & Co.; and all of his pecuniary interests, of every kind and character, have ever since been identical with those of Mark Hopkins, now deceased, and the said C. P. Huntington; and by reason of their connection with the Central Pacific Railroad Company, the corporation defendant, the pecuniary interests of the said Gallatin has been, and is now identical with it. Upon the fourth day of September, A. D. 1878, a suit was commenced in the Circuit Court of the United States in and for the District of Cali-

fornia, by the said Albert Gallatin, partner in the house of Huntington, Hopkins & Co., against the said Central Pacific Railroad Company, to procure the judgment of the aforesaid Court, and with the view of ultimately procuring the judgment of this Honorable Court in favor of the corporation known as the Central Pacific Railroad Company, *in re.*, the matter set forth in an Act of Congress, generally known as the "Thurman Bill," and entitled:

"An Act to alter and amend the Act entitled, 'An Act to aid in the construction of a railroad and telegraph line, from the Missouri River to the Pacific Ocean; and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1st; 1862; and also, to alter and amend the Act of Congress, approved July 2d, 1864."

The said Albert Gallatin, plaintiff and respondent in this action, has no interest as a party antagonistic to the defendant and appellant; he is a mere creature in the hands of the said corporation, and is now simply doing their bidding; and between the parties to this action there is no *real contest;* there is nothing between them to warrant a suit; and the only object of this litigation is to defeat the United States in its claim against the Central Pacific Railroad Company.

And this deponent further says, that he is informed and believes that the counsel of record for said Gallatin, plaintiff, was retained and paid by the corporation, defendant.

Deponent further says, that from his knowledge of the relations and interests that exist between the plaintiff and the defendant, he knows that the only object of this action is to defeat the Government of the United States in its effort to make the Central Pacific Railroad Company pay back to the Government its just dues; that the action instituted by the said Albert Gallatin, or his solicitor and counsel, is a subterfuge and a fraud; that, as the defendant is informed and believes, the amount involved in this litigation in behalf of the Government of the United States exceeds $150,000,000.

The deponent further says, that the Register of the said Circuit Court shows that this action was originally commenced ostensibly to obtain an injunction against the defendant's paying a dividend upon its capital stock; that subsequently a demurrer was interposed, and a *pro forma* decision had thereon. These proceedings were had without argument, and without the appearance of any counsellor who was seeking the true exposition of the law. An appeal was then taken from the judgment sustaining the demurrer, to this Honorable Court, and the parties are now here, endeavoring to procure a judgment and decree of the Court in an action where there is no issue between the parties upon the bill taken, as confessed.

Subscribed and sworn to before me, this 23d day of November, A. D. 1878.

JOHN L. LOVE.

A. D. GRIMWOOD,
Com'r U. S. ~~District~~ Circuit Court, Dist. of Cala.

Supreme Court of the United States.

No. 972

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND STANFORD AND OTHERS, APPELLANTS,

vs.

ALBERT GALLATIN, APPELLEE.

REPLY OF THE APPELLANTS TO THE MOTION OF THE ATTORNEY GENERAL TO DISMISS.

S. W. SANDERSON,
For Appellants.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 972.

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND STANFORD AND OTHERS, APPELLANTS,

vs.

ALBERT GALLATIN, APPELLEE.

REPLY OF THE APPELLANTS TO THE MOTION OF THE ATTORNEY GENERAL TO DISMISS.

This motion is made upon the ground that the suit is collusive, and the charge is based solely upon the affidavit of John Lord Love, a briefless attorney of this Court, residing in the city of San Francisco, who has always shown himself to be the ready tool of the personal and political enemies of the managers of the Central Pacific Railroad Company. In this proceeding he has assumed the character of *Amicus Curiæ*, "as a stalking horse 'neath which he shooteth the arrows of his malice." He appears here not as the friend of the Court, but as the enemy of the parties to this suit.

This suit is in no sense a collusive suit. It is, however, a friendly suit, brought under the following circumstances: After taking the advice of counsel, the managers of the Central Pacific Railroad Company determined not to comply with the requirements of the Thurman Act, (for reasons which are stated in my brief filed in this case, to which I refer and invite the attention of this Court,) and accordingly

acted in their official capacity in good faith, as charged in the bill, (Record, folios 29, 30, and 31.) This action was had without the knowledge of any of the stockholders, except such as were members of the Board of Directors. The question was one which they had to determine, and one which would not admit of delay, because the Thurman Act required them to pay a large sum of money, on the first of February then next, into the Treasury of the United States. They acted, therefore, in good faith, and in the ordinary course of business. By these proceedings a right of action was created in favor of all the stockholders against the company and the Board of Directors, which any stockholder had a legal right, in his own behalf and on behalf of all other stockholders, to enforce by a suit in equity. The consequences which might follow the action of the Directors, should the Thurman Act finally appear to be valid legislation, were serious. There was a chance that the Thurman Act might be valid, and, if so, a forfeiture of the interests of all the stockholders might follow. Whatever might be the hopes of the stockholders, they had a legal right to be guided by their fears and to institute legal proceedings to determine the constitutionality of the Thurman Act. This they determined to do, and the present suit was the result. And it does not lie in the mouth of any man to challenge their right to bring this action, whatever their wishes as to the final result may be. So far from attempting to impose a collusive suit upon the courts, the parties desired a full and fair discussion of the constitutionality of the Thurman Act. Instead of seeking to anticipate any action on the part of the United States, or prevent the Government from having an opportunity to be heard, counsel for both parties notified the United States district attorney for the district of California of the pendency of the suit, and invited him to appear therein on behalf of the United States, which he neglected to do, acting doubtless under the instructions of his superior officer. I am informed and believe that the Attorney-

General, by whom this motion has been made, was also duly informed of the pendency of this suit several weeks in advance of its decision in the court below. The officers of the United States, therefore, had ample time and opportunity to intervene and contest this suit, upon any grounds they saw proper, in the court below. For reasons satisfactory, doubtless, to the Department of Justice this was not done. When the case reached this Court I called upon the Attorney-General and brought it to his notice. I asked him to consent to its advancement, which he declined to do. I then moved for its advancement. My motion was denied, with leave to renew it with the concurrence of the Attorney-General. Myself and others solicited his concurrence at several times during several succeeding weeks. He allowed us to suppose that he would finally consent. Thus I was detained here several weeks in the expectation that I would be ultimately afforded an opportunity to discuss this case orally. But I could not allow the case to remain thus until after the time allowed for submission on printed arguments had expired. So, having obtained the consent of counsel for appellee, I informed the Attorney-General that, unless he would consent to advance the case, we should be compelled to submit it under the 20th rule. Thereupon I was curtly informed, for the first time, that he would move to dismiss the case. He made his motion the same day, in the vain hope, doubtless, that it might become an insurmountable obstacle which would prevent the submission of the case.

Such has been the remarkable course which the Attorney-General has seen proper to adopt in this case. That it has been devoid of courtesy towards counsel in the case, is a matter of little moment. His charge, backed even by the affidavit of John Lord Love, does not convince them that they are engaged in a collusive case, or that they have attempted to impose upon the court the decision of an important question without a full and fair argument, such as they are able to make, upon both sides. It is of moment, how-

ever, that the Attorney-General should seek, in this manner, to obstruct the course of justice, and prevent parties from obtaining the judgment of this Court upon a question of vital importance to them—a question, too, upon which the decision of this Court must be made at this term if it is to be of any benefit to them. It is also of moment, that instead of availing himself of the opportunity afforded by this case, to settle important controversies between the United States and the appellants, without further delay, he should prefer to continue the controversies indefinitely, to the great prejudice of both public and private interests.

The charge that the question is not fairly presented by the record is without foundation. The question turns wholly and solely upon the construction of the Pacific Railroad acts and the Thurman act. That such a question can be presented more fully in any other action or suit is a bald pretense unworthy of further notice.

It is also said that there is a suit brought, or about to be brought, by the United States against appellants, which will present the question involved in this case in a better form. This is not so. The suit referred to has been already brought. It is not founded upon, nor does it, in any respect, involve the validity of the Thurman act. It is founded upon an act of Congress entitled "An act to create an auditor of railroad accounts, and for other purposes," a printed copy of which is annexed hereto. The action is founded upon the fifth section. The Court, by referring to the two acts, will readily see that the validity of the Thurman act is no respect involved in the action referred to. But if it were, were the questions in the two actions in all respects the same, that fact would constitute no valid reason why this case should not be heard.

In this connection I deem it proper to state, that while the cases do not bear upon the same question, I proposed, several weeks ago, to the Attorney-General, if he would advance this case so that it might be heard sometime in

February, I would give such instructions as would, with his co-operation, result in bringing the case in question to this Court in time to be heard with the present case. He has not thought proper to accept my proposition. In view of this action on my part, I respectfully submit that this reference to that case comes with an ill grace from the lips of the Attorney-General.

Again: On the score of good faith this case does not rank below the case of the United States *vs.* The Union Pacific Railroad Company. (91 U. S. R., 72.) A controversy existed between the parties as to the construction of the Pacific Railroad act of 1862, in relation to the payment of interest on the subsidy bonds—the United States claiming that the company was required to pay the interest semi-annually, and the company, that they were not required to pay it until the maturity of the bonds. To settle the controversy Congress made a case, and authorized the company to sue the United States, which the company did; and this Court held that the contention of the company was right. If the present case is collusive, then was that case also collusive.

Again: This case having been brought for the benefit of all the stockholders, any stockholder now has the right to insist upon its prosecution, even though its inception was collusive. In this connection see the affidavit of John T. Willets, hereto annexed.

Should this motion be denied, the Attorney General asks that the case may be argued orally. While the foregoing statement shows that he is not entitled to such indulgence, no objection is interposed on the part of the appellants, *provided* the case can be heard sometime during the month of February.

In conclusion, I call the attention of the Court to the affidavit of C. P. Huntington, vice-president of the appel-

lant corporation, and one of the personal defendants, hereto annexed. If the foregoing statement contains what might under other circumstances be considered harsh criticism, no one regrets the necessity therefor more than I do. The course of the Attorney-General in this case has been, I hope, unusual. The motion which he has made is one which no attorney of this Court should make except upon the most conclusive testimony. Nor should this Court sustain a motion of this character unless the truth of the charge be established beyond all reasonable doubt. To close the doors of justice against these parties, upon the bald suggestion of a third party that they are not acting in good faith, would do them a great wrong, and confer upon the Government no benefit which it ought to be willing to accept. Such a motion reflects not only upon the good faith of the parties to the suit, but also upon the integrity of counsel who have taken the case, and under the circumstances, justice to myself and good faith to my clients, seem to me to imperatively demand at least all that I have said.

Still further, in conclusion, I desire to add that these appellants have not and do not challenge the right of the United States to intervene in this case for the purpose of debating its merits, that is to say, for the purpose of maintaining the validity of the Thurman act; but they do challenge the right of the Attorney-General or of any other person to assume the role of a partisan and intermeddle upon whatever pretext with the case for the purpose of preventing their coming to this Court for redress, as they believe, against a most atrocious wrong.

Respectfully submitted,

S. W. SANDERSON,
For Appellants.

AN ACT to create an Auditor of Railroad Accounts and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July first anno Domini eighteen and sixty-two, and the act entitled "An act relative to filing reports of railroad companies" approved June twenty-fifth, anno Domini eighteen hundred and sixty-eight, be, and the same are hereby, repealed.

SEC. 2. That the office of Auditor of railroad accounts is hereby established as a bureau of the Interior Department. The said Auditor shall be appointed by the President of the United States, by and with the advice and consent of the Senate. The annual salary of the said Auditor shall be, and is hereby, fixed at the sum of five thousand dollars. To assist the said Auditor to perform the duties of said office, the Secretary of the Interior shall appoint one bookkeeper at an annual salary of two thousand four hundred dollars, one assistant bookkeeper at an annual salary of two thousand dollars, one clerk at an annual salary of one thousand four hundred dollars, and one copyist at an annual salary of nine hundred dollars. Actual and necessary traveling and other expenses incurred in visiting the offices of the railroad companies hereinafter described, and for which vouchers shall be rendered, are hereby allowed, not to exceed the sum of two thousand dollars per annum; and it is hereby specially provided that each of said railroad companies shall furnish transportation over its own road, without expense to the United States, for the said Auditor or any person acting under his direction. Incidental expenses for books, stationery and other material necessary for the use of said bureau are hereby allowed not to exceed the sum of seven hundred dollars per annum. And the sum of twelve thousand dollars is hereby appropriated for the uses and purposes of this act for the fiscal year ending June thirtieth, anno Domini eighteen hundred and seventy-nine.

SEC. 3. That the duties of the said Auditor under and subject to the direction of the Secretary of the Interior

shall be, to prescribe a system of reports to be rendered to him by the railroad companies whose roads are in whole or in part west, north, or south of the Missouri river, and to which the United States have granted any loan of credit or subsidy in bonds or lands; to examine the books and accounts of each of said railroad companies once in each fiscal year, and at such other times as may be deemed by him necessary to determine the correctness of any report received from them; to assist the Government directors of any of said railroad companies in all matters which come under their cognizance whenever they may officially request such assistance; to see that the laws relating to said companies are enforced; to furnish such information to the several departments of the Government in regard to tariffs for freight and passengers and in regard to the accounts of said railroad companies as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interest of the Government; and to make an annual report to the Secretary of the Interior, on the first day of November, on the condition of each of said railroad companies, their road, accounts, and affairs, for the fiscal year ending June thirtieth immediately preceding.

SEC. 4. That each and every railroad company aforesaid which has received from the United States any bonds of the said United States, issued by way of loan to aid in constructing or furnishing its road, or which has received from the United States any lands granted to it for a similar purpose, shall make to the said Auditor any and all such reports as he may require from time to time and shall submit its books and records to the inspection of said Auditor or any person acting in his place and stead, at any time that the said Auditor may request, in the office where said books and records are usually kept; and the said Auditor, or his authorized representative, shall make such transcripts from the said books and records as he may desire.

SEC. 5. That if any railroad company aforesaid shall neglect or refuse to make such reports as may be called for, or refuse to submit its books and records to inspection, as as provided in section four of this act, such neglect or refusal shall operate as a forfeiture, in each case of neglect or refusal, of a sum not less than one thousand nor more than five thousand dollars, to be recovered by the Attorney General of the United States in the name and for the use

and benefit of the United States; and it shall be the duty of the Secretary of the Interior, in all such cases of neglect or refusal as aforesaid, to inform the Attorney General of the facts, to the end that such forfeiture or forfeitures may be judicially enforced.

SEC. 6. This act shall apply to any and all persons or corporations into whose hands either of said railroads may lawfully come, as well as to the original companies.

SEC. 7. This act shall take effect on and after the first day of July, anno Domini eighteen hundred and seventy-eight.

Approved, June 19, 1878.

SUPREME COURT OF THE UNITED STATES.

THE CENTRAL PACIFIC RAILROAD COMPANY AND OTHERS, Appellants,

vs.

ALBERT GALLATIN.

City and County of New York, ss:

Collis P. Huntington, being duly sworn says, that he resides in the city of New York; that he is the Vice President of the Central Pacific Railroad Company, and is also one of the defendants in the court below and appellant here, and is acquainted with the circumstances under which this action was brought in the Circuit Court of the United States for the District of California, by Albert Gallatin; that the said Albert Gallatin is and was at the time of the commencement of the suit, a stockholder of the Central Pacific Railroad Company, and was with other stockholders desirous to test the constutionality of the act of Congress approved May 7th, 1878, entitled "An act to alter and amend the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1st, 1862, and also to alter and amend the act of Congress approved July 2d, 1864, in amendment of said

first named act." That said act of May 7th, 1878, is comly called the "Thurman act."

That the deponent is advised and believes the said Gallatin acted in good faith and at the request of other stockholders, and that the suit was brought as well in his own behalf as in the behalf of all the other stockholders of said corporation, who should elect to join in the prosecution of the suit and contribute to the expenses thereof. And deponent says that the suit was not a collusive suit; that the said Company and its co-defendants have defended the suit vigorously, and have been extremely desirous that everything should be done to bring up the question of the constitutionality of the said act of Congress fairly and squarely and as speedily as possible, to the Supreme Court of the United States for its final adjudication.

And deponent further says that the company is advised by able counsel, that the act is unconstitutional, and that said company and its directors and officers are entitled to have the question heard and decided by the Court as speedily as possible.

C. P. HUNTINGTON.

Subscribed and sworn before me this 6th day of January, 1879.

[SEAL.] WM. C. McKEAN,
Notary Public, New York City.

SUPREME COURT OF THE UNITED STATES.

THE CENTRAL PACIFIC RAILROAD COMPANY AND OTHERS, Appellants,

vs.

ALBERT GALLATIN, Appellee.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

John T. Willets being duly affirmed, says that he resides in said city, and is a member of the firm of Willets & Co.,

doing business in the city of New York as merchants. That affirmant's firm are *bona fide* stockholders of the Central Pacific Railroad Company, and have been such stockholders for more than two years last past.

That affirmant is informed and believes that the above-entitled action was originally brought by one Albert Gallatin, a stockholder, in the circuit court of the United States for the district of California, in his own behalf; and also on behalf of all other stockholders of said corporation who shall elect to join in the prosecution of this suit, and contribute to the expenses of the suit, as appears by the bill of complaint, filed in this action; that as affirmant is informed and believes, judgment was given in the court below against the said corporation and other defendants; and the said defendants have appealed to this honorable Court for the purpose of testing the constitutionalty of the act of Congress approved May 7, 1878, entitled "An act to alter and amend the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July 1, 1862, and also to alter and amend the act of Congress, approved July 2, 1864, in amendment of said first-named act."

That affirmant has been informed and believes that the case has been submitted by the parties on printed arguments, under the rules of this Court, but that the Attorney General of the United States has made a motion in this Court to dismiss the said appeal on the ground of collusion between the said Gallatin and said appellants.

That it is a great hardship to affirmant's firm to be deprived of the dividends on their said stock, and he is informed that the company claims that it is enjoined against paying dividends until it complies with the above act of Congress, and that it cannot pay dividends until the question is decided by this Court. Affirmant as a party in interest therefore respectfully requests that the appeal be not dismissed, but that the case be continued on its merits and decided by this Court at the earliest possible moment, and if this Court shall be of opinion that there has been or is collusion between the said Gallatin and said corporation,

that it will not permit such collusion to prejudice affirmants' rights in the premises.

JNO. T. WILLETS.

Affirmed to before me this 16th day of January, 1879.

[SEAL.] WM. LINN KEESE,
Notary Public, Kings County.

Certificate filed in New York.

IN THE

Supreme Court of the United States.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Appellant.

vs.

ALBERT GALLATIN, *Appellee.*

Motion to Dismiss.

I make the following professional statement as to said motion, and append hereto the affidavit of Mr. Gallatin.

On or about the 15th of last November, Mr. H. P. McCoon, one of the solicitors for appellee, enquired of me, by telegraph, if I would ~~urge~~ argue this case here for Mr. Gallatin. I answered in the same way in the affirmative. On the 27th of the same month, with a retaining fee, I received from Mr. McCoon a letter in which he says: "I have no special instructions but Mr. Gallatin desires your best efforts to maintain the validity of the act referred to.

The Government being greatly interested in the question, I have sent a copy of the record to the United States Attorney-General, and have requested him to take part in the argument."

Mr. McCoon signified a desire to have an early hearing of the case, and learning that the court had decided not to advance the case without the consent of the Attorney-General I applied to him for such consent, stating to him that in my judgment the bill fairly raised the question as to the validity of the act of 1878, and that I was instructed to do my best to sustain it. This consent was refused.

I have had no conversation or understanding with any one directly or indirectly interested in or for the Pacific railroad, as to this case, except as follows:

On the 3d instant Judge Sanderson called on me and said that he had been hoping that some arrangement could be made with the Attorney-General to advance the case but was disappointed, and asked me if I would consent to submit it under the 20th rule. I told him I would answer on the next Monday, and on that day, after examining the case I agreed to the proposal.

I have argued the case exactly as though I had been employed by the Government for that purpose, and sent to the Attorney-General a copy of my brief the next day after it was printed.

I have not elaborated the argument as much as I otherwise should if the Pacific Railroad acts had not been a half a dozen times before this court; but I believe I have made all the points in the case for the appellee.

If the learned Attorney General had stated in his motion that the bill in this case appeared to be defective in any particular, or that the brief for the appellee indicated any favor to the railroad company, his motion would appear to have some force; but with the record and brief for the appellee before him he contents himself with an imputation upon the motives of the parties, as though a case perfect in all other respects was to be decided by this court upon the supposed good or bad motives of the litigants.

I undertake to say that the bill in this case is as full and as perfect as it can be made. All the facts to establish the rights of the complainant are set out in a clear and strong manner.

The decree of the court below must necessarily be affirmed, unless the act of 1878 is invalid. I know nothing about it, but see no reason to suppose that this is a collusive suit. To make it collusive there must be some suppression of truth or suggestion of falsehood, so as to mislead the court. I submit that there is nothing of that kind in this case.

Here is a real controversy between the parties. The case is made by the law and the acts of the directors of the company with which appellee had nothing to do. They, in defiance of the act of Congress, declared a dividend. The payment of this involves a forfeiture of the stock of appellee. Is he bound to wait for the United States to enforce this forfeiture? He is undoubtedly interested in the dividends, but he is a thousand times more interested in preventing a forfeiture of his property. There is nothing to show that he is not advised and does not believe the act of 1878 is valid.

There is an evident difference of opinion upon that subject, and in the decision of the question an immense amount of property is involved. It is perfectly reasonable therefore that the parties interested should desire an early decision of it, and if they have taken the proper and legitimate steps for that purpose, it is not for the Attorney General, or anybody else outside of the case, to object.

I believe it to be impossible for the Attorney General to make a case under the act of 1878 more favorable to the Government than the bill in this case makes. If the question as to the constitutionality of said act is fully, fairly, and necessarily raised, and is the only question to be decided, how can the Attorney General suppose that the judgment of this court upon that question can be affected by changing the form of the action and substituting the United States as plaintiffs.

I do not think the Attorney General ought to find fault with Mr. Gallatin, by whom he has been invited to appear herein for the Government, and when, by looking at the records and the briefs, he can see that the constitutionality of the act of 1878 is the sole question at issue; and that it can make no difference who are the parties or what facts are in the case, so long as that is the necessary and only question to be argued and decided.

GEORGE H. WILLIAMS,
For Appellee.

In the Supreme Court of the United States.

THE CENTRAL PACIFIC RAILROAD COMPANY and others, appellants,
vs.
ALBERT GALLATIN, respondent.

DISTRICT OF CALIFORNIA, *ss*:

Albert Gallatin, being duly sworn, says that he is the respondent herein. That he has been, at all times since the organization of said Central Pacific Railroad Company, and now is, a stockholder owning stock therein in his own name and right.

That this suit has been and is brought and prosecuted by deponent in good faith, for the purposes in deponent's bill of complaint set forth.

That deponent personally retained his own solicitor and his own counsel to conduct the same in the United States circuit court, and has also retained counsel to argue the same in the Supreme Court of the United States.

That this suit is brought in good faith to protect the stock of this affiant, and all other stockholders.

ALBERT GALLATIN.

Sworn to, this 24th day of December, 1878, before me.

JAMES D. CRAIG,
Notary Public.

Transcript
of
Records
1879

3335

Supreme Court U.S. States
10th Octo.
1-78

Demurrer

Field J

Motion for a Mandamus.

1879

10-1

Swayne

No. 8-ogl

SUPREME COURT OF THE UNITED STATES.

—:o:—

IRA G. FRENCH

vs.

THE U. S. CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.

PETITION FOR MANDAMUS.

S. O. Houghton, John Reynolds, Attorneys for Petitioner.

Denver

Field J

Motion for a Mandamus.

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10-1

Supreme

No. 8-0z

11.a

SUPREME COURT OF THE UNITED STATES.

—:o:—

IRA G. FRENCH

vs.

THE U. S. CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.

PETITION FOR MANDAMUS.

S. O. Houghton, John Reynolds, Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

Ira G. French vs. The U. S. Circuit Court for the District of California.

PETITION FOR MANDAMUS.

In the Supreme Court of the United States.

In the matter of the application of IRA G. FRENCH for a writ of mandamus
vs.
The U. S. Circuit Court of the 9th Circuit for the District of California, and Hon. LORENZO SAWYER, Judge of said Court.

To the Hon. the Judges of the Supreme Court of the United States:

The petition of Ira G. French respectfully shows:

That an action wherein he, the said French, was plaintiff, and L. M. Lincoln, Samuel O'Ness, Samuel Onesti, Antonio de Silva, and others, were defendants, was tried by the United States Circuit Court of the Ninth Circuit for the District of California, sitting without a jury, a jury trial having been waived by the parties, and the Judge of said Circuit Court afterwards, on the 7th day of October, 1878, made and filed his findings, wherein and whereby he found, among other things, that the defendants, Samuel O'Ness, Samuel Onesti, Antonio de Silva, and David Morrell, were in the separate possession of a specific portion of the premises described in the complaint, and in the judgment entered upon said findings; that the defendant L. M. Lincoln was so in possession of a certain other portion of said premises; that the defendant W. W. Crouse was so in possession

of a certain other portion of said premises; that the defendant Leonard Hoyt was so in possession of a certain other portion of said premises; and that the defendant R. Sherburn was so in possession of a certain other portion of said premises.

That upon said findings and in accordance therewith, a judgment was, on said 7th day of October 1878, entered, which is in words and figures following:

"In the United States Circuit Court for the District of California.

IRA G. FRENCH,

vs.

SARAH W. EDWARDS, ADMINISTRATRIX OF THE estate of Thos. Edwards, dec'd, L. M. Lincoln, W. W. Crouse, Leonard Hoyt, Wm. P. Carothers, executor of the last will and testament of A. Carothers, deceased, R. Sherburn, Jefferson Lake, Antonio de Silva, Samuel O'Ness, Samuel O'Nesti, and David Morrell. } No. 235.

The above entitled action having been tried before the Court without a jury, a jury trial having been waived by the parties, and the same having been argued and submitted to the Court for decision, and the same having been duly considered, and the findings of the Court being signed and filed, and the Court having ordered a judgment to be entered in favor of the plaintiff in accordance with the said findings—

And the defendant David Morrel having failed to answer the amended complaint filed in this action, and his default for want of such answer having been duly entered—

And the action having been dismissed by agreement of the parties without costs as against the defendants, Wm. P. Carothers, executor, &c., Sarah W. Edwards, Administratrix, &c., W. P. Carothers, Thomas Carothers and Jefferson Lake,

It is now by the Court ordered, adjudged and considered that the plaintiff, Ira G. French, do have and recover of and from the defendants, L. M. Lincoln, W. W. Crouse, Leonard Hoyt, R. Sherburn, Antonio de Silva, Samuel O'Ness, and

Samuel O'Nesti, the possession of the premises described in the complaint as follows:

All that parcel or tract of land situated in the town of Sutter, county of Sacramento, and State of California, bounded on the northeast and south by land formerly granted by the Mexican government to one John A. Sutter, and on the west by the Sacramento river; commencing at the corner of Main and Water streets, of said town of Sutter, at the east bank of said Sacramento river; running thence in a northerly direction, up and along said river, one-half mile; thence in an easterly direction, one mile; and thence southerly, at right angles, one-half mile; and thence westerly at right angles one mile to the place of beginning—being one-half of the original town of Sutterville, formerly so-called, now called Sutter, and being the same tract of land conveyed by said John A. Sutter to one L. W. Hastings, on the 30th of November, 1849, said premises being a part of the land granted to the said John A. Sutter, under the name of "New Helvetia," and containing 320 acres of land, except about 25 acres of said land described in the complaint not embraced in the patent of the United States to said Sutter, being blocks 142, 52, 53, and 54, and parts of blocks 51, 55, 140, 141, and 155, as laid down on the map of the said town of Sutter, and as designated on the plat annexed to the findings filed in this case.

Except also the following lots and parts of lots and blocks, as laid down and designated on said map and plat, to-wit:

Blocks 2 and 149,
Lots 8 and 9 in block 161,
Lot 4 in block 147,
Lot 2 in fractional block A,
Lot 10 in block 148,
Part of lot 1 only (80 by 40 feet) in block 135,
Lot 3 in block 161;
Lot 1 in block 150,
Lot 3 in block 148,
Lot 3 in block 189,
Lot 9 in block 174,
Lot 1 in block 163,
Lot 1 in block 16,
Lots 3 and 7 in block 1,

Lot 7 in block 175,
Lot 5 in block 186,
Lot 7 in block 174,
Lot 1 in block 161,
Lot 3 in block 16,
Lot 3 in block 136,
Lot 7 in block 189,
Lot 7 in block 49,
Lot 7 in block 163,
Lot 10 in block 161.
Lot 25 in block 148, Lot 9 in block 148.

And it is further ordered, adjudged and considered that the plaintiff do have and recover of and from the defendant, David Morrell, the possession of all the said premises described in the complaint.

And is is further ordered, andadjudged that the plaintiff do have and recover as damages for withholding possession of said premises, of and from the defendant L. M. Lincoln, the sum of three hundred and thirty dollars ($330), and from the defendant Leonard Hoyt, the sum of seventeen hundred and forty dollars($1,740),and of and from the defend'ts Antonio de Silva, Samuel O'Ness and Samuel O'Nesti the sum of two hundred and twenty-five dollars, ($225), and of and from the defendant R. Sherburn, the sum of twelve hundred dollars ($1,200), and of and from the defendant W. W. Crouse, the sum of two thousand five hundred and ninety-six dollars ($2,596]. And it is further ordered and adjudged that the plaintiff do have and recover of and from the defendants L. M. Lincoln, W. W. Crouse, Leonard Hoyt, R. Sherburn, Antonio de Silva, Samuel O'Ness, Samuel O'Nesti and David Morrell, for his costs and disbursements in this action expended, taxed at the sum of nine hundred fifty-nine 25-100 dollars.

"Judgment entered the seventh day of October, A. D. 1878.

That, on the 28th day of October, 1878, said Circuit Judge made and filed the following order:

"FRENCH vs. EDWARDS. } No. 235.

And now, on motion of the defendants' attorneys, it is

ordered that the amount of the bond to stay the execution of of the judgment in this case, as to the possession of the land found by the findings filed herein, to be in the separate possession of the defendant Lincoln, and also as to the judgment against him for damages and costs be, and the same is hereby fixed at $3,000.

And it is further ordered that the amount of the bond to stay the execution of the judgment as to the land found by the findings filed herein to be in the separate possession of the defendants, O'Ness, O'Nesti and de Silva, and also to stay the execution of the judgment against them for costs and damages be and the same is hereby fixed at the sum of $3,000.

Dated October 28th, 1878.

LORENZO SAWYER,
Circuit Judge."

That on the 28th day of October, 1878, the defendants sued out a joint writ of error, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA, ss.
The President of the United States of America,

To the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, within and for the District of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between L. M. Lincoln, W. W. Crouse, Leonard Hoyt, R. Sherburn, Antonio de Silva, Samuel O'Ness and Samuel O'Nesti, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, on the second Monday of October, A. D. 1879, in the said Supreme Court, to be then and there held, that the record and pro-

ceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States, the 103d.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge Ninth Judicial Circuit.

Attest: L. S. B SAWYER, Clerk,
By J. F. O'Beirne, Dep. Clk.

That on said 31st day of October, 1878, certain of the defendants filed in said Circuit Court two several bonds in the words and figures following to wit:

"In the Circuit Court of the United States, 9th Circuit for the District of California.

L. M. Lincoln, W. W. Crouse, Leonard Hoyt, R. Sherburn, Antonio de Silva, Samuel O'Ness, and Samuel O'Nesti, plaintiffs in error, against Ira G. French, defendant in error.

Know all men by these presents, that we, L. M. Lincoln, as principal, and Charles V. Brockway, and Moses Sprague as sureties are held firmly bound unto Ira G. French, in the just and full sum of Three Thousand dollars to be paid to the said French, his heirs, executors, administrators and assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents Sealed with our seals and dated October 29th, 1878.

Whereas, lately, at a term of said Circuit Court in an action depending in said court wherein Ira G. French, the said defendant in error was plaintiff, and the said L. M. Lincoln and others were defendants, a judgment was rendered in favor of said French and against the said Lincoln for $330 damages, with $960 for costs and for posession of the land found by the findings filed in said case to be in the separate possession of the said Lincoln.

And whereas the judge of said Circuit Court on the 28th day of October, 1878, made an order in said case fixing the sum of $3,000, as the amount of the penalty, in a bond to stay execution of said judgment as to the said Lincoln pending the decision of the Supreme Court of the United States, on a writ of error sued out in said case and whereas the said plaintiffs in error have lodged a copy of said writ of error with the Clerk of said Circuit Court for the use of the said defendant in error and have served on him a citation admonishing him the said French, to be and appear at a session of the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1879.

Now the condition of the above obligation is such that if the said plaintiffs in error shall prosecute their said writ to effect and answer all costs and damages if the said Lincoln fail to make good his plea—then the above obligation to be void, else to remain in full force and virtue.

L. M. LINCOLN. [SEAL]
C. V. BROCKWAY. [SEAL]
M. SPRAGUE. [SEAL]

In the Circuit Court of the United States, 9th Circuit for the District of California.

L. M. LINCOLN, W. W. Crouse, Leonard Hoyt R. Sherburn, Antonio de Silva, Samuel O'Ness, and Samuel Onesti, Plaintiffs in error,
vs.
IRA G. FRENCH, Defendant in error.

Know all men by these presents that we Charles Brockway, and Moses Sprague, are held and firmly bound unto Ira G. French in the just and full sum of Three Thousand dollars to be paid to the said Ira G. French, his heirs, executors, administrators and assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated October 29th, 1878.

Whereas lately at a term of Said Circuit Court in an action depending in said court wherein Ira G. French, the said defendant in error was plaintifl, and the said Samuel O'Ness, Samuel O'Nesti, Antonio de Silva and others were defendants

a judgment was rendered in favor of said French and against the said O'Ness, O'Nesti, and de Silva for $225 damages with $960 for costs and for possession of the land found by the findings filed in said case to be in the separate possession of the said O'Ness, O'Nesti and de Silva.

And whereas the Judge of said Circuit Court on the 28th day of October, 1878, made an order in said case fixing the sum of Three Thousand dollars as the amount of the penalty in a bond to stay execution of said judgment as to said O'Ness, O'Nesti and de Silva pending the decision of the Supreme Court of the United States on a writ of error sued out in said case.

And whereas the said plaintiffs in error have lodged a copy of said writ of error with the Clerk of said Circuit Court for the use of said defendant iu error and have served on him a citation admonishing him, the said French, to be and appear at a session of the Supreme Court of the United States to be holden at Washington on the 2d Monday of October, 1879.

Now the condition of the above obligation is such that if the said plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if the said O'Ness, O'Nesti and de Silva fail to make good their plea, then the above obligation to be void else to remain in full force and virtue.

C. V. BROCKWAY, [SEAL]
M. SPRAGUE, [SEAL]"

Upon each of said bonds the Judge of said Circuit Court made and signed an endorsement, as follows, to-wit:

The form of the within bond and the sufficiency of the sureties thereon hereby approved. October 31st, 1878.

Lorenzo Sawyer, U. S. Circuit Judge.

That on said last named day the said Circuit Court made and entered an order as follows, to-wit:

"IRA G. FRENCH
vs.
THOMAS EDWARDS, ET AL. } Order entered Oct. 31, 1878

A writ of error having been sued out and perfected by the defendants in said action, and defendant L. M. Lincoln hav-

ing given the proper bond to operate as a supersedeas as to the judgment against him, and the defendants O'Nesti, O'Ness and de Silva having given a similar bond as to the judgment against them, ordered that proceedings be stayed as to the moneys recovered against said Lincoln and as to the sixty acres of land found by the Court to be in his possession, as described in the findings in said cause, and also that proceedings be stayed as to the judgment for damages and costs against said O'Ness, O'Nesti, and de Silva, and as to the land found to be in their possession as described in findings of the Court in this cause. And that a writ of restitution and execution issue as to the remaining defendants and the remainder of the land recovered in the action."

That afterwards, the plaintiff, by his attorneys, applied to the Clerk of said Circuit Court for an execution upon said judgment, as against all the defendants against whom judgment was entered and as to all the land awarded to the plaintiff by said judgment, but said clerk refused to issue such execution as against the defendants, L. M. Lincoln, Samuel O'Ness Samuel O'Nesti and Antonio de Silva or as to the land found to be in their possession. That the plaintiff then applied to said Circuit Court on due notice, for an order directing the complete execution of said judgment. That said Circuit Court refused to vacate its orders theretofore made and hereinbefore set forth, and refused to permit the execution of said judgment as against the defendants Lincoln, O'Ness, O'Nesti and de Silva, or any or either of them, or as to those portions of the land found to be in the possession of said last named defendants, holding and deciding that the said writ of error hereinbefore set forth, operated as a supersedeas, as to the said last named defendants, and the land found to be in their possession.

Wherefore, your petitioner prays that a writ of mandamus issue from this Court to the said Circuit Court for the District of California, directing said Circuit Court to proceed and completely execute its said judgment, notwithstanding said writ of error and said orders of said Circuit Court.

And that this Court will grant such other relief in the premises as may be proper.

S. O. HOUGHTON,
JOHN REYNOLDS,
Attorneys for Petitioner.

STATE OF CALIFORNIA, }
County of Santa Clara, } ss.

John Reynolds, being duly sworn, on his oath says that he is an attorney of the Supreme Court of the United States, and the attorney for the plaintiff in the above entitled action in the Circuit Court, and one of the attorneys for said plaintiff, the petitioner, in the Supreme Court of the United States; that he has read the foregoing petition and knows the contents thereof, and that the same is true.

Subscribed and sworn to before me this, September 10th 1879 } JOHN REYNOLDS.

[SEAL.]

L. S. B. SAWYER,

Clerk of the Circuit Court of the United States for California.

In the Supreme Court of the United States.

In the matter of the application of Ira G. French for a mandamus
vs.
The U. S. Circuit Court of the 9th Circuit District of California.

To the Hon. the Circuit Court of the United States for the District of California, and Hon. Lorenzo Sawyer, Judge of said Court, and to Messrs. J. H. McKune and J. W. Armstrong, Attorneys for the defendants in French vs. Edwards et al.

Please take notice that upon the petition, a copy of which is herewith served, we shall move the Supreme Court of the United States, at the opening of said Court, at the City of Washington, D. C., on the third Monday in October next, or as soon thereafter as counsel can be heard, to grant the prayer of said petition and to issue a mandamus to the said Circuit Court directing it to proceed to fully and completely execute the judgment entered in said Circuit Court on the 7th day of October 1878, in favor of said Ira G. French against L. M. Lincoln et als, administratrix of the estate of Thomas Edwards a copy of which judgment is set out in the petition herewith served.

Yours, &c.,

S. O. HOUGHTON,
JOHN REYNOLDS,
Attorneys for Petitioner.

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF IRA G. FRENCH, FOR A MANDAMUS,

vs.

THE U. S. CIRCUIT COURT FOR CALIFORNIA.

The petition shows that a judgment was entered in the circuit court, for the recovery of a tract of land found by the court to have been in the possession of the defendants—each holding separate portions—and awarding judgment against the defendants, severally, for damages, amounting in the aggregate, to $6,091. + $959.25 - Costs -

The defendants, as plaintiffs in error, sued out a joint writ of error from this Court, to review this judgment.

One of the plaintiffs in error gave a bond in the penal sum of $3,000, to answer all costs and damages if he failed to make good his plea. And certain other defendants gave a similar bond for the same amount.

And thereupon the circuit judge ordered a stay of execution, as to the judgment against the plaintiffs in error, giving such bonds, as to the damages against them, and as to the land in their several possession, and directing the execution of the judgment as against the other plaintiffs in error, and the land in their several possession.

Section 1000, U. S. Revised Stat., requires that the judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect; and if he fail to make his plea good, shall

answer *all* damages and costs, where the writ is a *supersedeas* and stays execution.

Rule 29, following this provision of the statute, provides that in real actions the bond must be for the whole amount of damages recovered, and for just damages for delay.

In Stafford *vs.* Union Bank of Louisiana, (17 How., 275) this court held that when the bond was not equal to the whole amount recovered, the writ did not operate as a *supersedeas*, and this court would award a writ of mandamus directing the circuit court to execute the judgment.

It is no answer to this motion to say that the judgment, sought to be reviewed by the writ of error, is in effect a separate judgment against each defendant, as to the land found to be in his possession and the damages for withholding the same, for it is the writ that operates as a supersedeas, and the stay must be co-extensive with the operation of the writ.

If the judgment is separate, so that each defendant is entitled to a stay independently of the others, each must sue out his separate writ. The defendants, against whom several judgments are entered, cannot join in the writ for the purpose of conferring jurisdiction on this Court and sever for other purposes. It may require all the defendants to join in order to make the amount sufficient to sustain the writ of error, and we submit that the writ cannot be upheld by the joinder, and operate severally.

JOHN REYNOLDS,
S. O. HOUGHTON,
For the Motion.

UNITED STATES SUPREME COURT.

IRA G. FRENCH

vs.

THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.

PETITION FOR MANDAMUS.

Brief for Defendant.

The facts in this case are these: French brought an action of ejectment in the Circuit Court against L. M. Lincoln, Samuel O'Ness, Samuel Onesti, Antonio de Silva and others, alleging that all the defendants were in the joint possession of the town of Sutter, containing some three hundred and twenty acres of land.

The defendants above named filed separate answers, and alleged that they were severally in the possession of certain of the premises demanded, and they asked that there might be separate findings and separate judgments against them.

The case was tried without the intervention of a jury, and the court found that the defendants, Lincoln, O'Ness, Onesti and de Silva, and also certain other defendants, to wit, W. W. Crouse, Leonard Hoyt and R. Sherburn were in possession of a portion of the premises sued for, and rendered judgment against them for said premises so found in their possession.

The court also found that the plaintiff was entitled to recover, as damages from defendant Lincoln, $330; from defendant Hoyt, $1,740; from defendants de Silva, O'Ness, and Onesti, $225; from defendant Sherburn, $1,200; and from

defendant Crouse, $2,596, and gave judgment accordingly.

The court, on motion made for that purpose, fixed the amount of the bond at $3,000, to be given by the defendant Lincoln to stay execution of judgment as to the possession of the land found to be in his separate possession and as to costs, and also fixed a like amount for the bond to be given by O'Ness, Onesti and de Silva.

This was done upon proof given to the satisfaction of the Court.

Afterwards a joint writ of error was sued out in this court by Lincoln, Crouse, Hoyt, Sherburn, de Silva, O'Ness and Onesti.

Lincoln gave bond in the sum of $3,000, and O'Ness, Onesti and de Silva also gave bond in a like sum, conditioned that they would prosecute their several suits to effect, &c. These bonds were approved by the Judge of the circuit court.

A transcript of the record was duly filed in this court.

The plaintiff, French, thereupon applied to the Clerk of the circuit court for an execution upon said judgment against all the defendants, and for all the lands awarded to the plaintiff by the judgment, but the Clerk refused such execution as against the defendants Lincoln, O'Ness, Onesti, and de Silva.

He then applied to the court to direct that such an execution should be issued. This the court refused to do, and thereupon a petition for a mandamus is filed for the purpose of compelling it to make the order.

It appears from the answer of the respondent (which is not denied) that the plaintiff has sued out his writ of possession, and has taken possession of all the lands awarded to him, except the tracts found in the several possessions of the defendants who have given bond as aforesaid.

Upon these facts we maintain that the petition for a mandamus should be dismissed.

1. In California it is well settled that defendants who are

sued in ejectment upon an alleged joint possession may answer separately and demand findings and judgment upon their separate possessions of the *locus in quo*.

Winans vs. *Christy*, 4 Cal., 70.
Anderson vs. *Parker*, 6 Cal., 200.
Curtis vs. *Sutter*, 15 Cal., 264.
Ellis vs. *Janes*, 26 Cal., 276.
Luse vs. *Clark*, 28 Cal., 35.

2. If there may be separate findings and judgments, then it is clear that the defendant who has a separate finding and judgment against him may stay proceedings without giving a bond that shall make him responsible for all the judgments against his co-defendants; otherwise the provision that he may answer separately and have a separate judgment would be of no avail whatever.

3. The fixing of the amount and taking bond for a supersedeas is matter of discretion in the judge, and therefore any error he may commit in that regard is not ground for mandamus.

Rev. Stat., Sec. 1000.
Jerome vs. *McCarter*, 21 Wall., 28.

4. This court will refuse to order by mandamus that an execution issue on a judgment, unless it appears from the record that there has been mistake, misconduct, or omission of duty on the part of the court.

United States vs. *Trigg*, 11 Pet., 173.

5. The case of *Stafford* vs. *Union Bank of Louisiana*, 17 How., 275, cited by counsel for relator, is not applicable to this case. The statute then in force required that the bond, to operate as a supersedeas, should be equal to the amount of the judgment or decree. The decree was for $65,000 and the bond for only $10,000. The statute was mandatory, and in executing it the judge had no discretion.

We ask that the prayer of the relator be denied.

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